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ALEXANDER L. STEVAS,
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No. 82-256

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MICHIGAN,

PETITIONER,

v.

DAVID KERK LONG,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

# JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 13, 1982.
CERTIORARI GRANTED OCTOBER 12, 1982.

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| DATE | PROCEEDINGS |
|---|---|
| 1977 | |
| Aug. 25, | Complaint Filed |
| Aug. 25, | Warrant Filed |
| Aug. 29, | Arraigned — District Court |
| Sept. 22, | Preliminary Examination |
| Dec. 28, | Opinion and Order Binding Defendant over for Trial |
| 1978 | |
| Jan. 4, | Information Filed |
| Jan. 20, | Arraignment — Circuit Court — Not Guilty Plea Entered |
| Mar. 3, | Motion to Quash and/or Suppress Evidence Filed |
| Apr. 28, | Defendant's Motion to Suppress and Motion to Quash Denied |
| Apr. 28, | Peoples Motion for Consolidation Denied in Part |
| Aug. 28, | Jury Trial Begins |
| Aug. 29, | Jury Trial Ends — Verdict Entered |
| Sept. 15, | Sentence: Poss. Controlled Substance-Marijuana Prob. 2 Yrs. Fine $750.00 Costs $300.00 starting 10-15-78 payable $50.00 per month — Appeal Filed |
| Sept. 22, | Claim of Appeal Filed — Court of Appeals |
| 1979 | |
| Apr. 3, | Appellant's Brief on Appeal Filed |
| July 20, | Appellee's Brief on Appeal Filed |

| DATE | PROCEEDINGS |
|---|---|
| 1979 | |
| July 31, | Record Filed |
| Oct. 2, | Submitted on Case Call |
| Dec. 18, | Court of Appeals Opinion Filed |
| 1980 | |
| Jan. 7, | Application for Leave to Appeal to Supreme Court Filed |
| July 15, | Application for Leave to Appeal granted by Supreme Court |

MICHIGAN COURT OF APPEALS # 78-3810

| | |
|---|---|
| 01 PEOPLE OF MICHIGAN,<br>Plaintiff<br>02 LONG DAVID KERK,<br>Defendant | Court of Appeals<br>File No. 78-3810<br>Lower Ct. No.<br>78-100 FY |

| | |
|---|---|
| 9/22/78 | Claim of Appeal |
| 9/15/78 | Order Appealed From: Barry County Circuit C<br>Judges: Deming, Hudson E. LCT 78100 FY<br>Possession Marijuana |
| 10/06/78 | Steno Certificate R-02295 Goodwin, Annet<br>Date: 10/04/78 |
| 1/04/79 | Notice of Filing Trans R-02295 Goodwin, Annet<br>Date: 1/03/79 |
| 1/31/79 | Stip Extnd Time Appt Brf<br>Extend Until: 04/03/79 |
| 4/03/79 | Appellant Brief |
| 5/11/79 | Appearance Atty For Pl |
| 5/14/79 | Stip Extnd Time Appe Brf<br>Extend Nntil: 06/11/79 |
| 6/08/79 | Motn Extend Time Appe Brf |
| 7/16/79 | Order Ext Time Appe Brief |
| 7/20/79 | Motn Extend Time Appe Brf |
| 7/20/79 | Appellee Brief |
| 7/24/79 | Noticed for: Oct Record Reqst |
| 7/31/79 | Record Filed Lc File & Tr(2) |
| 8/07/79 | Order Ext Time Appe Brief |
| 10/02/79 | Submitted on Case Call |

| | |
|---|---|
| 12/18/79 | Opinion Filed |
| 1/07/80 | Appl for Leave to Sup Ct Aty: Geary, James H. |
| 1/22/80 | Transferred to Sup Crt Lc File; 2-Trans; and Coa File Sent to Supreme Court |
| 7/15/80 | S/Ct Order Grant Application |
| 1/06/81 | Oral Arguments Held |
| 6/14/82 | Supreme Court Opinion Conviction Reversed |
| 7/09/82 | Remittitur and Records Returned |
| 7/21/82 | File Rtrnd by Sup Crt |

(Certification omitted in printing.)

[SEAL]

People of the State of Michigan,

Plaintiff-Appellee,

v

David Kerk Long,

Defendant-Appellant.

(Counsel Deleted)

MICHIGAN SUPREME COURT #64416
APPEAL FROM COURT OF APPEALS #78-3810
COUNTY — BARRY — #78-100-FY

| DATE | PROCEEDINGS |
|---|---|
| **1980** | |
| Jan. 7 | Application filed. |
| Jan. 17 | Answer and Brief in Opposition to Application filed. |
| Jan. 25 | Court of Appeals & Circuit Court records filed. |
| July 15 | GRANTED, to be heard Jan, 81. |
| Dec. 1 | Motion for permission to file typed briefs filed. |
| Dec. 12 | Motion to expand record filed. |
| Dec. 16 | Motion to file typewritten brief GRANTED. |
| Dec. 19 | Response to motion to expand record filed. |
| **1981** | |
| Jan. 6 | Argued and submitted #5. |
| **1982** | |
| June 14 | REVERSED. |
| July 9 | Circuit Court and Court of Appeals records returned w/remittitur. |

(Certification omitted in printing.)

[SEAL]

**COMPLAINT**
(Filed: August 25, 1977)

**STATE OF MICHIGAN**
**THE DISTRICT COURT—JUDICIAL DISTRICT**
**NO. 56—1st Division**
County of Barry

| | |
|---|---|
| THE PEOPLE OF THE STATE OF MICHIGAN<br>vs.<br>DAVID KERK LONG<br>Defendant(s) | Case No. 78-100-FY<br>A-507-77 |

Date of Offense on or about, to-wit: August 25, 1977
Location Township of Orangeville, Mullen Road
Complainant George Howell
Complaining Witness George Howell

STATE OF MICHIGAN }
County of Barry } ss.

The above-named COMPLAINING WITNESS being duly sworn before the undersigned Judge, Magistrate, or Clerk of the District Court, upon the date indicated below, says that heretofore on the DATE OF OFFENSE listed above, at the LOCATION listed above in the said County, State of Michigan, the above-named Defendant(s),

David Kerk Long of 159 North Park Drive, Grand Rapids, Michigan, did then and there possess with intent to deliver a certain controlled substance, to-wit: Marijuana: Contrary to M.S.A. 18.1070(41)(1)(c).

Punishable by imprisonment in the State Prison for not more than 4 years or by a fine of not more than $2,000.00, or by both such fine and imprisonment.

WARRANT AUTHORIZED BY
(s) GARY R. HOFMAN
*Prosecuting Attorney*

contrary to the form of the statute in such case made and provided, etc.

WHEREFORE, the said Complainant prays that the said Defendant(s) may be apprehended and held to answer this Complaint and further dealt with in relation to the same, as law and justice may require.

Dated August 25, 1977

Subscribed and Sworn to on this day by
(s) GEORGE HOWELL
*Complaining Witness*

(s) MARGARET SNYDER
Before the above named
*District Judge/Deputy Clerk/ Magistrate*

**WARRANT**
(Filed: August 25, 1977)

**STATE OF MICHIGAN**
**THE DISTRICT COURT—JUDICIAL DISTRICT**
**NO. 56—1st Division**
County of Barry

(Title omitted in printing.)

TO ANY SHERIFF, DEPUTY SHERIFF, COURT OFFICER, STATE POLICE OFFICER, OR POLICE OFFICER.

WHEREAS, the above-named COMPLAINING WITNESS hath this day made and filed a Complaint in the District Court for the said Judicial District alleging that heretofore on the DATE OF OFFENSE listed above, at the LOCATION listed above in said County, State of Michigan, the above-named Defendant(s)

David Kerk Long of 159 North Fark Drive, Grand Rapids, Michigan, did then and there possess with intent to deliver a certain controlled substance, to-wit: Marijuana; Contrary to M.S.A. 18.1070(41)(1)(c).

Punishable by imprisonment in the State Prison for not more than 4 years or by a fine of not more than $2,000.00, or by both such fine and imprisonment.

contrary to the form of the statute in such cases made and provided, etc.

WHEREAS on examination of said sworn COMPLAINT by me, it appears to me that said offense has been committed and there is just cause to suspect that said Defendant(s) are guilty thereof: THEREFORE IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, you and each of you are hereby commanded forthwith to take the said Defendant(s) and bring them before this Court, to be dealth with according to law.

Dated August 26, 1977

(s) JOSEPH L. BAUM
*District Judge*

(4) DIRECT EXAMINATION

By: Mr. Weller

Q. State your name please?

A. George Howell.

Q. Are you employed?

A. Yes sir.

Q. By whom?

A. Barry County Sheriff's Department.

Q. Were you so employed on August 25th of 1977?

A. Yes sir I was.

Q. What was your shift that evening?

A. Working from eleven o'clock on the 24th until seven a.m. on the 25th.

Q. In regard to this case did anything unusual occur that evening?

A. Yes sir, my partner Deputy Lewis and I were southbound on Norris Road.

Q. Approximately what time was this?

A. That was approximately twelve o five a.m. on the 25th.

Q. Continue.

A. We were southbound on Norris Road on the way to a complaint. We were south of Keller Road approximately a third to a half a mile. We met an oncoming car coming towards

us. We had moving radar. Tripped the radar at seventy-one miles an hour. At this time I turned around, went after the vehicle. The vehicle I believed to be the same one that tripped the radar made a left turn headed west on Mullin Road. After it (5) turned west on Mullin Road approximately a hundred and fifty feet, something like that, a short ways down the road, the front end of the car went into the north ditch. The car ended up broadside in the road. The car was facing north with the front end of the car in the ditch.

Q. What did you do then?

A. At this time we pulled up to the vehicle, had our lights on, both my partner and I exited our vehicle, walked to the Defendant's vehicle. Defendant in the meantime had exited his vehicle and walked to the rear of his car.

Q. How did he leave his vehicle?

A. He got out and walked back to the back of the vehicle.

Q. Alright, what happened then?

A. He did not say anything at all. I asked him twice to produce his driver's license. After asking him the second time to produce his driver's license, he produced his driver's license. I then asked him twice for his registration and proof of insurance. After asking him the second time, he started to walk towards the driver's door of the vehicle.

Q. Alright if you will hold it just a second. Is the gentleman that you stopped that evening present in Court today?

A. Yes sir, he's the gentleman with glasses on and the tan suit on.

MR. WELLER: Let the record reflect that he has identified the Defendant, David Kirk Long.

Q. Alright now you were relating that he met you and he was starting back to his vehicle?

(6) A. Yes sir that is correct. I was behind him and my partner was to the Defendant's left. The door of the vehicle was open, interior light was on.

Q. Was that open all the time or what?

A. Yes sir, apparently he didn't close it all the way or he left it open when he got out of the car. The door was open.

Q. How much?

A. All the way.

Q. All the way, alright.

A. As we were walking up we got to approximately the area of the rear tire of the car, I saw a large folding knife laying on the floor board near the outward edge of the seat. At this time I stated Hold it. I don't remember if he just stopped or if I put my hand on his arm, anyway he stopped and my partner picked up the knife. I told Mr. Long to put his hands on the roof of the car which he did.

Q. What was your purpose in doing this?

A. Well there was a large folding knife on the floor. He had not said anything to us and I frisked him for weapons.

Q. You were searching for weapons?

A. Yes sir I frisked him.

Q. Alright, what next occurred?

A. Okay, after I frisked him I walked up to the door of the car looking for another weapon. I shined my light into the car. There was arm rests—the front seat of the vehicle was equipped with arm rests. I saw something that appeared to be under the arm rest. At this time I kneeled in the vehicle and (7) I lifted the arm rest. There was a leather pouch, it appeared to be like a long folded wallet, folded in half, it wasn't what you would call a wallet but it appeared something like that. It was laying underneath the arm rest, I lifted the arm rest, it was open and the—

Q. Now the arm rest wasn't open but you say this leather pouch or whatever was open?

A. Yes sir, the arm rest was down, when I lifted the arm rest—folded the arm rest up the pouch was open. It was unfolded and it was on the—would be towards the passenger's side of the vehicle. In that compartment there was a plastic baggie and as I kneeled in the car I shined the flashlight on it and it appeared to me to be marijuana in the plastic baggie.

THE COURT: That wasn't in the pouch, that was separate from the pouch?

MR. HOWELL: No sir, it was in the pouch but part of it was sticking out of the pouch. At this time I picked it up and I got back out of the vehicle. I took the baggie—well I picked it up and I could feel something else inside of it. I didn't know what it was. I removed the baggie. The object I felt in there was a glass bottle, small glass bottle with a screw on top. There was a white substance in there and one compartment on the other side of the pouch there was two pieces of paper. There was a piece of tinfoil and it had a

white pill in there wrapped in the tinfoil. At this time I put it in my back pocket and I says you're under (8) arrest. I then searched the car for anymore suspected narcotics and also checked the glove box for registration for the vehicle.

Q. Was the registration ever produced?

A. No sir, there was no registration for the vehicle we had stopped. There was a registration containing the Defendant's name and for a Buick and it was a different license number than the vehicle I had stopped. I did not remember the particular license number of the vehicle we had stopped but I knew the letters were different. There was also title in there for a Mercury.

Q. Was that the kind of car you stopped?

A. Yes sir, it was a seventy-two Mercury. In later checking it was the same VIN number but I noticed that the title was in the name of a William Brake and an address of Kalamazoo.

• • •

Q. Then you said you placed the subject under arrest?

A. Yes sir, after I examined I placed him under arrest.

Q. On what charge?

A. Possession of marijuana.

Q. Alright, what happened next?

(9) A. After checking the interior of the car, as I was getting out of the vehicle I noticed the keys weren't in the ignition. The vehicle was going to have to be towed away, there was nobody else to drive it and he was under arrest. The vehicle was sitting cross ways in the road. As I exited the

vehicle Mr. Long was still standing beside the car. I asked him for the keys for the vehicle so he produced a single key with no key ring or anything else. At the time I asked him if he had any trunk keys or anything else because it seemed unusual just a single key along with what I already related. He stated no, I don't have one.

Q. You indicated earlier you felt the need to call a wrecker in this particular incident?

A. Yes sir that is correct.

Q. Is that standard policy for your department?

A. Yes, well our policy is when we place somebody under arrest, if either there's nobody else in the car to drive it or the subject we are arresting owns a car and he doesn't want another occupant to drive it, we have it towed away because we have taken him away from his vehicle and there's certain responsibility there. We also check the vehicle to make sure there's nothing valuable that can later be claimed to be stolen.

Q. Alright pursuant to that—

A. Pursuant to having the vehicle removed from his possession, yes.

Q. You say you placed the subject under arrest and he was (10) alone?

A. Yes sir that is correct.

Q. And that caused you to summon a wrecker?

A. Yes sir I later did, yes. My intention at the time when I got out of the vehicle and I asked him for the keys I knew we would have to have the keys to remove the vehicle. The steering column locks and locked ignition, steering and trans-

mission. After receiving the key from him I walked to the rear of the vehicle and noticed that the trunk lock had been punched out. At this time I took my pocket knife and reached in and unlatched the latch.

Q. Why did you do that?

A. It was unusual circumstances to me. Also we check the vehicle to make sure there's nothing, you know, that's valuable.

Q. And you do that in limited circumstances where there is no other person to drive the vehicle away?

A. Yes sir.

Q. Is that standard policy?

A. It's my policy, yes.

THE COURT: What's your policy? I kind of missed that when a truck went by.

MR. HOWELL: Yes sir, we don't—I think what the Prosecutor is getting at is an inventory search. We do not have an inventory search.

THE COURT: Alright so you opened the trunk?

MR. HOWELL: Personally, well I can't speak for the other officers, myself I check the vehicle to make sure (11) there's nothing of value in there that can be later claimed—

THE COURT: Alright, fine, but why did you open the trunk?

MR. HOWELL: Number one, because I already found marijuana, suspected marijuana in the interior of the car, there may have been more in the trunk. Secondly I check them for valuables. I do.

Q. What, if anything, did you find when you opened the trunk?

A. Yes sir I—

MR. JERKINS: I'm going to object to all of this as objectionable as a result of an illegal search.

MR. WELLER: I don't think it's an illegal search, your Honor, I think it's an inventory search that has been approved of and in fact that's exactly what this was.

MR. JERKINS: He's already testified it was not an inventory search.

MR. WELLER: Yes, he said that—

THE COURT: Well let's not argue here. He has objected and number one he said I searched the trunk because he had already found marijuana in the car and number two he looked to see if there were any valuables in the car, is that correct?

MR. HOWELL: Yes sir it is.

THE COURT: Alright and you objected?

MR. JERKINS: That's correct.

THE COURT: Now Mr. Weller?

(12) Q. What did you find in the trunk?

THE COURT: Well just a minute.

MR. WELLER: I think this was a valid inventory search, however the officer wants to term it. The car was being impounded and the officers have a Court approved right to this type of search when they are empounding a vehicle .

THE COURT: Mr. Jerkins?

MR. JERKINS: Your Honor, if he wants to search that particular trunk he should attempt to get a search warrant to search that trunk. Because he may in his opinion and we haven't had a chance to get cross examination have found some small quantity of what he suspects to be marijuana in no way indicates that there is marijuana in the trunk and if there's any valuables in the trunk and there's no lock on it, I submit that that doesn't follow. He didn't even make inquiry of Mr. Long if there were any valuables in there and certainly as far as protection of themselves, all they had to do was get a statement from Mr. Long that there's no valuables in there and that there's no lock in there, there is no necessity to go into that trunk.

THE COURT: There's got to be some law on this, isn't there?

MR. JERKINS: Quite a bit of law on this. A lot of law on this.

THE COURT: Let's take a short recess. Can I see you both?

(Court was recessed at 3:25 p.m.)

(13) (Court was reconvened at 3:35 p.m.)

THE COURT: Let the record show I have conferred with counsel in Chambers and I understand this is our agreement. You go ahead with the Examination and then the questions on the search will be determined on briefs later, is that correct?

MR. WELLER: Correct, your Honor.

MR. JERKINS: That's my understanding.

THE COURT: Okay, Mr. Weller?

DIRECT EXAMINATION (Continued)

Q. The last question I believe is what did you find when you opened the trunk?

A. Two large bags having a substance—first of all the two bags had slits in them. They were open so the contents could be seen.

THE COURT: I'm sorry—you found what?

MR. HOWELL: Two large bags in the trunk of the vehicle.

Q. What kind of bags? Plastic or paper?

A. Well, paper and there was like a waterproofing substance over the top of the paper.

Q. How big were they?

A. It appeared approximately like that.

Q. Is that about three feet long?

A. Yes sir, approximately three foot by eighteen inches. In both bags the substance appeared to be marijuana.

Q. At this point what did you then do?

(14) A. The subject was handcuffed, placed in the cruiser, advised of his rights. The wrecker came, they took the vehicle. We followed the wrecker to the sheriff's department around back to our garage. Deputy Lewis went with the vehicle and wrecker and secured it. I took Mr. Long to the security garage, took him in where he was booked by the correction's officer and after the vehicle was secured, tests were run by Deputy Lewis.

Q. Did you cause samples of those substances seized on this occasion to be analysed?

A. Yes sir they were.

Q. Did you receive a report of the analysis?

A. Yes sir we did.

• • •

(16) CROSS EXAMINATION

By Mr. Jerkins:

Q. Officer, how long have you been a deputy sheriff?

A. Deputy Sheriff almont seven years, I had three years with Detroit City Police.

Q. Have you had any specialized training as far as narcotics?

A. Yes sir, when I worked for Detroit we had an in-service training for running field tests on marijuana, cocaine, et cetera.

Q. Alright and that was ten years ago then?

A. Well, probably eight, nine.

Q. I take it then that's the only training you have actually had?

A. Yes sir.

Q. Alright, now on this particular occasion on August 25th, who was driving the cruiser?

A. I was sir.

Q. And it was dark obviously?

A. Yes.

Q. It was past midnight, twelve o five?

A. Yes sir that's correct.

Q. Alright now when this other car went by you that your radar indicated it was doing seventy-one miles per hour, did you notice what type of car it was?

A. No sir, the exact make I did not.

Q. I take it all that really happened was you noticed a car go by and you noticed what the radar indicated?

(17) A. Yes sir, can I relate something?

Q. Go ahead.

A. When a vehicle is coming towards you at night it's hard to tell what they are. Personally I try to, when they go by, get some description of the front end or note something about the vehicle. As it went past me I was applying my brakes I noticed that the tail light on the passenger's side, the outboard part of the tail light was partially broken showing part of the white light.

Q. Alright and that's all you really observed about this particular vehicle?

A. Yes sir, also I thought it was dark green.

Q. Alright, as far as who was driving the vehicle, could you tell if it was a male or female?

A. No sir I could not.

Q. As to how many people in the vehicle, I take it you didn't notice that either?

A. I believe that was one. To the best of my knowledge there was one.

Q. Alright but you could'nt really tell because all of this was happening so fast and the other vehicle was going faster, right?

A. That is correct.

Q. Alright, now you had to go some distance, did you not, before you turned around?

A. As soon as I stopped there was a driveway right there and to the best of my recollection I believe I backed into (18) the driveway and turned around.

Q. How fast were you going by the way?

A. I believe approximately fifty-four miles on hour.

Q. Alright, that's going in the opposite direction?

A. Yes sir, that's correct.

Q. Alright, when you turned around are you telling this Court that the vehicle that went by you was still in sight?

A. Yes sir it was but shortly after turning around there is a curve from the right to the left and it was out of my sight.

Q. Alright and you also indicated that the car apparently made a left turn and went down another road, now you didn't see that left turn, did you?

A. Yes sir I did.

Q. You did see that?

A. Yes.

Q. Did you see the car when it went in the ditch?

A. After it made the left turn there is some trees and brush there. As I was coming up to the intersection it appeared to me that the lights swerved.

Q. Okay, so what you're saying is—

A. It appeared to me the lights weren't going straight anyway.

Q. Alright, I also understand from your testimony you did not see Mr. Long get out of the vehicle, is that correct?

A. Yes sir I did.

Q. You did see him get out of the vehicle?

(19) A. Yes sir.

Q. I thought you said that as you pulled up you saw him by the rear of the trunk?

A. No sir.

Q. You didn't say that? You are saying then you actually saw someone get out of the vehicle?

A. Yes sir, as we pulled up to that vehicle he was sitting in the driver's seat, as we pulled up and turned the overheads on, we got out of our vehicle, he exited his car and he met us by the trunk of his car.

Q. Alright so he was still in the vehicle is what you're telling us now—when you pulled up?

A. Yes sir.

Q. Alright and when you pulled up, you asked him what?

A. I asked him for his driver's license.

Q. And he did furnish that to you, is that correct?

A. Yes sir, I believe I asked him twice.

Q. Alright and then he furnished it to you?

A. Yes sir.

Q. Alright, he was cooperative, was he not?

A. Yes sir.

Q. Didn't give you any hard time, didn't appear beligerent or anything like that?

A. He didn't say a word.

Q. He didn't say a word, alright. If anything then would you say he was rather passive?

A. No sir, I wouldn't say passive.

(20) Q. What would you say? How would you describe him as far as his conduct?

A. He appeared to be under the influence of something.

Q. Okay, anything besides that?

A. You're asking me for opinion, my opinion?

Q. Pardon?

A. In my opinion he acted scared.

Q. He what?

A. I said in my opinion he acted scared.

Q. He acted scared? Well, don't most people when they are stopped by a police officer at twelve o five act a little nervous and scared?

A. No sir.

Q. You don't think so?

A. No sir.

Q. I see, you've never had that experience I take it?

A. Yes I have at times. Usually they have open intox in the car or something like that.

Q. Now I take it then when you asked for his registration this is when he started walking back towards the car and you were walking back and then you saw something on the floor, is that right?

A. Yes sir, that's correct.

Q. That's when you say you saw this object that appeared to be a knife?

A. Yes sir.

Q. Were other items on the floor?

(21) A. On the driver's side there were some papers and letters on the floor board, yes sir.

Q. Weren't there a lot of tools on the floor?

A. On the front floor board?

Q. Yes.

A. No, there weren't any.

Q. You didn't see any tools? All you saw was some papers and what you thought was a knife, is that what you are telling this Court?

A. Yes sir, I believe there were some tools on the back floorboard.

Q. Some tools on the back floorboard?

A. There may possibly have been, I'm not sure, but there weren't any on the front floorboard.

Q. Well, where was this so-called knife that you're talking about?

A. Best as I can describe it, it was forward—if I can show you—this is the front edge of the seat and this is the outboard part of the seat here, it was by the door, the knife was laying approximately in this area right on the floorboard approximately that far away from the edge of the door on the floorboard.

Q. Well, let me see if I can translate that a little bit for the record. Are you saying that this was on the passenger's side or the driver's side of the front seat?

A. It was on the driver's side.

Q. Okay, by the floorboard you're talking about the floor?

(22) A. Yes sir, near the driver's door.

Q. Alright, near the driver's door?

A. Yes sir.

Q. Okay, and any other tools you didn't see up in that area at all?

A. No sir, I did not.

Q. Where were these other tools that you saw?

A. I said I believe there may possibly have been some on the rear floorboard, I am not really sure.

Q. Behind the driver or behind the passenger?

A. Very possibly there have been some behind the driver.

Q. Alright, would you describe this seat for us so I understand what it is. Is it a flat bench type seat or are they buckets, or what are they?

A. I believe it's what they call a split bench.

Q. Now so we are clear on a split bench, you mean that there are actually two different seats?

A. Yes sir, it's a bench seat but it's divided in the middle.

Q. Alright and when you say it's divided in the middle, what divides it?

A. There's not a console or anything like that if that's what you mean.

Q. Alright, there's no console?

A. No.

Q. Okay, are there arm rests?

A. Yes sir.

Q. Where are these arm rests?

(23) A. In the middle of the seat.

Q. How many arm rests are there?

A. There are two.

Q. Two?

A Right.

Q. Alright, do they fold back into the back part of the seats?

A. That is correct, they fold up and back into the seats.

Q. Okay, so when you want to use the arm rests you have to pull it forward and down, is that right?

A. Yes sir, that is correct.

Q. Alright, in what condition were these arm rests when you approached the vehicle?

A. You mean where were they at?

Q. Where were they located?

A. Down.

Q. Down and when you say down, you mean on the seat?

A. Yes sir.

Q. Okay, now at the time that you saw this what you thought was a knife on the floor, this is when you then stopped Mr. Long and told him hands up against the car or to that effect?

A. Yes sir.

Q. And that's when you searched him?

A. I frisked him.

Q. Alright, you didn't find any weapons, did you?

A. No sir, I did not.

(24) Q. Okay and at this partciular point was he free to leave?

A. Was he free to leave?

Q. Yes, was he free to leave?

A. No I still wanted to talk to him about why the car was in the ditch and also in reference to speeding.

Q. Did you ever talk to him about that?

A. Later on, yes I did.

Q. Later on, alright. He wasn't free to leave I take it?

A. I still wanted to talk to him.

Q. Well, you may have wanted to talk to him but was he free to leave? What if he said I'm leaving?

A. I would say hold up.

Q. Would have stopped him, detained him?

A. He wouldn't have driven the car away, yes I probably would have.

Q. Pardon?

A. In my opinion he was under the influence of something as I stated previously.

Q. Would you, at this particular time, consider him under arrest?

A. Under physical arrest?

Q. Yes.

A. No sir.

THE COURT: Can you speak up a little louder please?

MR. HOWELL: Yes.

A. No sir, not under physical arrest.

(25) Q. Is there another kind of arrest besides physical arrest?

A. Well we were detaining him at that time that would be similar to a traffic stop.

Q. So what you're telling us, if I understand your testimony, is that he was under your control at this point?

A. Yes sir that is correct.

Q. And you weren't going to let him go until you finished whatever it was that you wanted to do?

A. Yes sir, that's correct.

Q. Okay, and in fact when you told him to put his hands up on the car, you expected him to do that, didn't you?

A. Yes sir, that's correct.

Q. What if he wouldn't have done that, what would you have done?

A. I would probably put his hands on the car and checked him.

Q. Okay, so you were—would have forceably made him do it then?

A. Yes sir.

Q. And you did then actually search him at this point?

A. Yes sir, I frisked him.

Q. Alright, you frisked him. Alright, now at that point you have already determined he has no weapons, he's under your control, he's not able to leave cause you aren't going to let him leave, right?

A. Right, he's not handcuffed or anything.

Q. I understand he's not handcuffed but he's under your control?

(26) A. Yes sir.

Q. There are two officers there, is that right?

A. Yes sir there is.

Q. Alright and are you telling us that all you wanted in that car was to find the registration and proof of insurance?

A. Yes sir, that's what I'd asked him for.

Q. Alright, that's what you asked him for. Did he tell you that it was in the glove compartment of the car?

A. No sir.

Q. He didn't? Did he tell you that's where he was going to go to get them?

A. He didn't say anything.

Q. I see, did you ask him where is the registration or where is the proof of insurance?

A. I asked him for it, I didn't ask him where it was.

Q. But you weren't going to let him go to the car, were you, at this point?

A. Not after we saw a knife, no sir.

Q. By the way did you pick up the knife?

A. Yes sir.

Q. Okay, so you knew there was no knife in the car then?

A. We knew we had that knife, yes sir.

Q. Alright, and you didn't know whether or not there was another knife in the car or anything, did you?

A. No sir, I did not.

Q. Alright, you never asked him where in the car is the registration or proof of insurance?

(27) A. No sir.

Q. I see, so at this point I take it then what you do is you proceed then and start searching the car?

A. No sir, I looked in the vehicle. I wasn't looking for the registration.

Q. What were you looking for then when you were looking in the vehicle?

A. To see if there was another weapon in the car.

Q. To see if there was another weapon, I see. Now he was away from the car, wasn't he?

A. Approximately—are you talking about from the open door?

Q. Yea.

A. Approximately two or three feet.

Q. Alright, did your partner have him so that he had him pretty much under control at this point while you are inside the vehicle?

A. He was standing beside him.

Q. Alright so you weren't concerned then about Mr. Long then, were you?

A. I didn't completely ignore him.

Q. No I understand that but you weren't that concerned because you knew your partner was watching him and keeping him under control?

A. No sir I wouldn't say that I was not concerned. I was concerned.

Q. What were you concerned about from Mr. Long? You had already searched him and he was standing there next to your (28) partner who is a police officer and has a revolver, doesn't he?

A. Right.

Q. Alright, what were you concerned about then?

A. Well my partner didn't have any reason to draw a gun on him. He didn't have a gun held on him. Number two, he is probably a foot taller than my partner.

Q. I see, well if that was your concern, why didn't you then take Mr. Long and take him over to your squad car then?

A. Cause I didn't have any reason to at that time.

Q. In other words you didn't have any reason even to have him standing next to your partner, is that what you are telling us?

A. I didn't have any reason to take him to the cruiser.

Q. Pardon?

A. I didn't have any reason to take him to the cruiser. At that time I was interested in the registration that I asked him for and when he walked up there, there was a knife there and we checked him and I checked inside the car for another weapon.

Q. I see.

A. If I hadn't found anything I would have asked him to get the registration.

Q. In other words what you wanted to do then was search the car for weapons or anything else that you may find before you asked him where the registration and the certification of insurance were?

(29) A. No sir, I checked the car for weapons, not everything.

Q. I see, now you say you had to lift up the arm rest, is that right?

A. Yes that is correct.

Q. You actually lifted it up?

A. Yes sir.

Q. Okay, now you didn't reach under there with your hand to feel, is that correct?

A. No sir, I just lifted the arm rest.

Q. You lifted it up—I see. At this point you say you saw a leather pouch?

A. Yes sir.

Q. Did you feel the pouch at all?

A. No sir.

Q. Could you put a gun in that pouch?

A. Could I put a gun in it?

Q. Yea, could you put a gun in it?

A. Yea, you could probably put a twenty-five automatic in it.

Q. But you didn't feel it?

A. No sir.

Q. To see if there was a tweny-five in it?

A. No sir.

Q. What you did is you actually opened it up and removed things from it, is that correct?

A. No sir.

Q. Pardon?

A. No sir.

(30) Q. Well what did you do to this pouch?

A. When I saw it I could see what appeared to be a plastic baggie so I shined my flashlight on it.

Q. And this is after you had picked it up and removed it from under the—

A. No sir I didn't touch it at all. The only time I touched it was after I thought I saw what appeared to be marijuana.

Q. After what you thought was marijuana?

A. Yes sir that's correct.

Q. You're an expert on what marijuana looks like I take it, is that what you're telling us?

A. Not an expert.

Q. Alright now at this point then you removed this plastic baggie, right?

A. Yes sir, I picked the pouch up and stood outside the vehicle by the open door.

Q. What else did you do to this pouch then?

A. The leather pouch itself?

Q. Yes.

A. When I did pick it up in the same compartment that the baggie was in I could feel a solid object. I removed the baggie, looked at the contents, also removed the glass bottle—

Q. Alright so this pouch has a glass bottle in it besides then?

A. Yes sir that's correct.

(31) Q. And that you couldn't see until after you removed the baggie, is that what you're telling us?

A. That's right, when I opened it up to remove the baggie, the bottle was there.

Q. I see and in this particular bottle you saw a white substance, is that right?

A. Yes sir that's correct.

Q. And at this point did your expertise tell you what that was?

A. I suspected it of cocaine.

Q. You suspected?

A. Right.

Q. I see.

A. I'm not even an expert on that.

Q. Pardon?

A. I said I'm not an expert on that. My partner—I asked him and he thought it was and he told me. I searched the other side of the pouch and as I stated there were two packages of cigarette papers, roll your own, there was a piece of tin foil with one white pill in it, prescription type pill.

Q. Now in order to find that you had to open the other side of the pouch and then you also had to open up the tin foil, is that correct?

A. That is correct.

Q. Then after opening up those two items, you saw one pill which appeared to be a prescription pill?

A. Yes sir.

(32) Q. Alright is that the only pill you found by the way?

A. Yes sir it is.

Q. Now is it at this point then that you go to Mr. Long and say you're under arrest?

A. Yes sir, as I stated he was standing—it would be to the typewriter or a little bit further away, I stated you're under arrest for grass.

Q. You're under arrest for grass?

A. Right.

THE COURT: You have to speak up now.

MR. HOWELL: I stated you're under arrest for grass.

Q. And that's what you told him—that expression?

A. Yes sir.

Q. I see, alright and then you asked, of course, as you've already told the request for the key to the car to drive the car out of where it was in the road and that's when you found out there was only one key and there was no trunk key, is that right?

A. Yes sir, I asked for a key.

Q. Alright and that's when you also saw that the lock in the trunk was punched out, is that correct?

A. Yes, after I received the key.

Q. And then it's at that point when you open up the trunk by using your knife, is that true?

A. Yes sir, that's correct.

Q. Alright, and in there that's when you find as a result of (33) opening up this trunk, that's when you find these two bags?

A. Yes sir.

Q. Alright, now did you ever ask Mr. Long if you could open up his trunk?

A. No sir, I did not.

Q. So there's no question you didn't get his consent to look into that trunk or to look into the car?

A. No sir.

Q. Okay, there's no question but what, as far as the pouch, you couldn't see that pouch until you lifted the arm rest?

A. I could see something but I didn't know exactly what it was.

Q. Okay, you didn't know what it was until you lifted the arm rest?

A. Yes sir.

Q. Alright, did you ever search that car after that for registration and proof of insurance?

A. I believe I stated previously after I told him he was under arrest I looked in the glove box of the vehicle, I did not find a registration for that vehicle.

Q. Alright so you went to the glove box then to find those items, is that true?

A. Yes, sir, also to check for other contraband.

Q. That's after you had found what you believed to be contraband?

A. Yes sir, that's correct.

Q. Let me ask you this, Officer, he was not in the car and (34) you wanted to see the registration and proof of insurance, is it not a fair statement that most people carry those two items in the glove box?

A. Either in the glove box or in their wallet.

Q. Alright, and you didn't ask him if his was in his wallet so his might have been in his wallet for all you know?

A. May have been but after I asked him he started walking towards the car.

Q. Alright, so at that point then was it your opinion that these items were probably in the glove box?

A. Yes sir that's correct.

Q. Now isn't it also a fair statement that if you were concerned about anything in the car, any weapons, that either you or your partner could have asked him if you could go to the glove box to get the proof of insurance and registration?

A. If we were worried about—

Q. Any weapons in the car?

A. That is possible.

Q. Well you certainly had him under your control, you have already told us that.

A. I wouldn't say we had him completely under our control.

Q. You wouldn't say that after you had already had him up against the car and after you have already searched him, you didn't think he was under your control?

A. We weren't holding him.

Q. Well I thought you said he wasn't free to leave?

A. That is correct.

(35) Q. So he wasn't free to leave and you had already searched him and what you're saying is that you didn't have him under your control, is that what you're telling this Court?

A. It all depends on what you mean by control.

Q. Well so that he couldn't run away or so that he couldn't try to jump in the car or something like that?

A. Nothing says that he couldn't push one or both of us away and try to run or jump in the car.

Q. I see, did you ever give him a traffic citation?

A. Yes sir I did at one point.

Q. Pardon?

A. Yes sir I did.

Q. And what was that?

A. That was for speeding.

Q. And that's all you gave him? Is that the only citation?

A. For traffic offenses, yes sir.

Q. Did you then take that citation back?

A. Yes sir I did.

Q. When did you give him the citation?

A. I believe I gave it to him shortly after he was booked or in the morning.

Q. Shortly after when?

A. Shortly after he was booked or in the morning, around seven o'clock, I'm not sure which.

Q. And when did you take the citation away from him?

A. After talking to the Prosecutor.

Q. So in other words it was voided out, is that what you are (36) telling us?

A. That is correct.

Q. Now as far as any weapon charge or anything pertaining to this so-called knife, he wasn't charged with any violation concerning that, was he?

A. No sir he was not.

Q. So the only thing he was charged with then are these charges which are here before this Court as a result of your going into his car and searching the car?

A. Yes sir, that's correct.

Q. He wasn't charged with being a disorderly person either, was he?

A. No sir.

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DIRECT EXAMINATION

By Mr. Weller:

Q. State your name please?

A. Rick E. Lewis.

Q. Are you employed?

(37) A. Yes sir I am.

Q. By whom?

A. Barry County Sheriff's Department.

Q. Were you so employed on August 25th of this year?

A. Yes I was.

Q. Directing your attention to the early morning hours, specifically near midnight or shortly thereafter, did you have cause to come in contact with the Defendant in this case?

A. Yes sir I did.

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Q. Did you come in possession of substances you believed to be contraband?

A. Yes sir we did.

Q. Did you exercise any control over that suspected substance?

A. Yes sir I did.

Q. What did you do in regard to transporting or in taking custody of that substance?

A. After the evidence was returned to the Barry County Sheriff's Department it was marked and sealed. I then transported it—

THE COURT: Who marked and sealed it?

MR. LEWIS: Myself and Deputy Howell. The evidence then was transported by myself to Michigan Department of Public Health Lab in Lansing the following morning. It (38) would be the same date.

Q. Did you deliver those substances to the Department of Public Health?

A. Yes I did.

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(45) • • •

CROSS EXAMINATION
By Mr. Jerkins:

Q. Deputy Lewis, how long have you been a deputy?

A. I've been a deputy approximately three years.

Q. Alright, have you had any specialized training in narcotics?

A. Yes sir I have.

Q. And what is that?

A. I worked with the regional crime unit for approximately a year and a half.

Q. And other than working with them, has that been the extent of your specialized training?

A. No sir, I worked undercover for approximately a year and a half. I attended the DEA school, Drug Enforcement Administration School sponsored by the Federal Government on narcotics.

Q. I see, now on this particular occasion, the 25th of August, who was driving the cruiser?

A. Deputy Howell.

Q. And did you see a vehicle go past your cruiser in the opposite direction?

A. Yes I did.

(46) Q. And did you observe who, if anyone, was in that vehicle?

A. No sir.

Q. You didn't observe if it was one, two, three or four people or male or female?

A. Not at that time, no sir.

Q. Alright, I take it then that your cruiser ultimately stopped and turned around to go after this vehicle?

A. That's correct.

Q. Did you have this vehicle in your vision at all times?

A. No sir, not at all times.

Q. And when this vehicle made a turn, a left turn, as there as been some testimony, did you see it make a left turn?

A. Yes sir, I saw the tail lights go around the corner.

Q. Alright, and did you see the vehicle come to a stop?

A. Yes sir, I did.

Q. You did see it come to a stop?

A. Yes sir.

Q. Alright, did you see anyone get out of the vehicle?

A. Yes sir I did.

Q. And how many people got out of the vehicle?

A. One person.

Q. One person—where was that person when the cruiser pulled up?

A. Sitting in the driver's seat in front.

Q. Alright, now I take it that you got out of your cruiser?

A. That's correct.

Q. And the other Deputy Howell got out of the cruiser likewise?

(47) A. That's correct.

Q. The two of you approached this subject?

A. Yes sir.

Q. And that individual, was he asked for anything?

A. Yes he was.

Q. And what was that?

A. He was asked for his driver's license, registration and proof of insurance.

Q. And did you get any response?

A. Not the first time.

Q. Second time?

A. Yes sir.

Q. What response did you get?

A. He produced his driver's license.

Q. Did he say anything?

A. No sir.

Q. Alright and after he produced the driver's license, then what happened?

A. He then was asked to get his registration and proof of insurance.

Q. Did he say anything.

A. No sir.

Q. How many times did you ask that?

A. I believe he was asked twice.

Q. What happened after the second request?

A. He started to walk towards the open driver's door of his vehicle.

(48) Q. Alright and then what occurred?

A. At that time Deputy Howell and myself spotted a knife laying along side the front seat.

Q. And then what occurred.

A. At that time he was told to stop. I retrieved the knife and Deputy Howell patted him down to make sure he did not have any more weapons.

Q. Alright and at this particular time was he placed under arrest?

A. No sir he was not.

Q. Now he was patted down and had his hands up on the car at one time, is that correct?

A. That is true.

Q. Was he free to leave?

A. Yes sir at that time he could have walked away.

Q. He could have walked away?

A. Yes sir.

Q. I see. Now did anyone ask then of Mr. Long where his registration and proof of insurance was?

A. I don't recall if he was asked at that time or not.

Q. What did you do after he had been searched?

A. I stood there beside him and I had the knife in my hand.

Q. What was the purpose of your standing next to him?

A. Just to make sure that he didn't have any weapon on him that he could use on either myself or Deputy Howell.

Q. Well, hadn't he already been searched?

A. Yes sir.

(49) Q. And no weapon was found?

A. That's correct.

Q. So you knew that then?

A. Can't be positive.

Q. Oh, you can't be positive. You were there though to see that he was under control, is that what you're saying?

A. I was there to see that he did not harm anyone.

Q. Alright, so that he couldn't do anything that would cause any harm to either you or Deputy Howell, is that true?

A. That's correct.

Q. So that are you satisfied in your mind at that point that you had him under control so that he couldn't do any harm to either you or Deputy Howell?

A. No sir, he could have ran. He could have ran at my partner.

Q. Alright, he could have run?

A. Yes sir.

Q. But you were aware that you were there and could do something about that if he did or at least try to do something?

A. Try to do something, yes sir.

Q. Alright, now was it at this time then that Deputy Howell started searching the vehicle?

A. At that time he went into the vehicle, yes sir.

Q. What did you observe Deputy Howell doing?

A. I could not see in the vehicle, I was standing towards the rear of the vehicle. I could not see in the vehicle.

Q. Did you see him looking under seats?

(50) A. I saw him in the vehicle but I couldn't tell what he was doing.

Q. You don't know what he was doing?

A. No.

Q. I see, now did there come a time that the registration and the proof of insurance, at least some papers, were located?

A. Yes sir.

Q. When was that?

A. Deputy Howell found several different types of papers in the vehicle.

Q. When? At the scene there or later on at the garage or what?

A. At the scene.

Q. At the scene. Was this before or after he handed you these items which you have testified to and had sent to the laboratory?

A. That was before he found the other stuff.

Q. You mean he found the papers before he found the items which you believed to be narcotic items?

A. Yes sir, he found some of them laying on the floor in the front seat underneath the driver's seat which he found as soon he looked in.

Q. Well can you tell us whether or not he found the registration and the proof of insurance before he found what you suspected to be narcotics?

A. No sir, I believe he searched the vehicle for weapons first and at that time he found them. Like I say there were papers on the floor and all over the car.

Q. Well he found what when he was searching for weapons?

(51) A. He found the pouch.

Q. He found the pouch? You don't know where the pouch came from?

A. I did not see where it was at. All I know is what Deputy Howell told me.

Q. Alright now who arrested Mr. Long?

A. Deputy Howell placed him under arrest.

Q. And what was he arrested for?

A. Possession.

Q. Of what?

A. Marijuana to start with and then the other things.

Q. Alright, he didn't give any consent to either you or Deputy Howell to search the vehicle, did he?

A. That's correct, he did not.

Q. He did not, alright, after he was arrested you had custody of the vehicle, did you not?

A. That's correct.

Q. And in fact you made arrangements to have a wrecker come and take that vehicle down to the sheriff's garage, is that true?

A. That's correct.

Q. And in fact it was taken into the sheriff's garage, isn't that true?

A. That's correct.

Q. Was it searched again down there by the way?

A. I don't know if Deputy Howell searched it. I know I did not search the vehicle again.

(52) Q. In any event there's no doubt in your mind but what that vehicle was safe and secure in the sheriff's garage?

A. Yes sir.

Q. And there's no question in your mind but what you knew that Mr. Long was elsewhere than with vehicle, is that true?

A. That's correct.

Q. That vehicle wasn't going anywhere without either you or Deputy Howell releasing it, isn't that true?

A. That's correct.

Q. In fact isn't it also true that same control over that vehicle began when you first saw the knife?

A. No sir, it began when he was placed under arrest.

Q. When he was placed under arrest. You're saying then that you had no control over that vehicle until after Mr. Long was placed under arrest?

A. No actual control, yes sir.

Q. Pardon?

A. No actual control.

Q. Well, were you going to let Mr. Long go into that vehicle after you had seen the knife?

A. No sir.

Q. Alright, in fact you wouldn't let him do that, would you, if he tried to make any effort to do that?

A. That's correct.

Q. So that as far as you were concerned Deputy Howell then had control of that vehicle. Mr. Long wasn't going to get in (53) there cause you weren't going to let him?

MR. WELLER: Objection, how can he say what Howell was doing.

THE COURT: Alright, sustained.

Q. In any event you knew that Mr. Long didn't have any control over that vehicle at that point?

A. I knew that he was outside the vehicle.

Q. Alright, fine.

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THE COURT: Any Motions, Mr. Weller?

MR. WELLER: Well I would move to bind the Defendant over. I understand the Court wishes to reserve ruling on that motion until briefs are submitted.

THE COURT: Mr. Jerkins?

MR. JERKINS: Yes, your Honor, I would move for dismissal of all the charges against my client on the basis (54) of illegal search and seizure and the fact that there has been no showing at all that my client had any knowledge of these items in the vehicle nor that he had any control over these. It is my understanding likewise, as Mr. Weller has stated, that the Court will reserve its decision until such time as we furnish briefs on these legal points.

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**STATE OF MICHIGAN**
**IN THE DISTRICT COURT**
**FOR THE COUNTY OF BARRY**

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|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br>Plaintiff,<br>versus<br>DAVID KERK LONG,<br>Defendant. | FILE NO.<br>A-506-77<br>A-507-77<br>A-508-77 |

**OPINION**
(Filed: December 28, 1977)

Defendant herein is charged with three charges of violation of the Controlled Substance Act, to-wit: methaquelone, cocaine, and marijuana with intent to deliver. Preliminary Examination was held on all three charges. At the Examination the Prosecutor introduced evidence of the three substances involved. The contraband was admitted subject to Defendant's objections. Examination on all three charges was concluded with the stipulation that Defendant would file a brief touching on the initial search and seizure of the controlled substances. The Prosecutor has filed a reply brief.

It appeared from the testimony that the automobile driven by the Defendant was clocked with speeding at 71 miles per hour by two deputies of the Barry County Sheriff's Department. The deputies pursued the Defendant who ultimately ended up in the ditch. The deputies exited their vehicle and were met by the Defendant at the rear of his vehicle. After being asked twice for his driver's license and proof of registration, the Defendant started to walk toward the driver's door of his vehicle. The door was open and the interior light on.

At this time one of the deputies noticed a large "folded knife" lying on the floorboard of the car. At this point the Defendant was frisked for weapons and the knife retrieved from his auto. The deputy then shined his flashlight into Defendant's vehicle and saw something on the front seat. The deputy then knelt in the vehicle and lifted up an armrest where he found a pouch containing marijuana, a glass bottle of cocaine and also a white pill wrapped in tinfoil. At this point the Defendant was placed under arrest. The remainder of the vehicle was searched and nothing was found. It was also determined that the car was owned by someone other than the Defendant.

The officer asked the Defendant for the keys to his car inasmuch as the vehicle would have to be towed away because the Defendant was under arrest. The Defendant produced a single ignition key and stated that he had no key for the trunk. The deputy observed that the lock had been punched out of the trunk and he opened the trunk with the use of his pocketknife. The deputy testified his reasons for opening the trunk were (1) because he had already found marijuana in the passenger compartment and (2) to see if there were any valuables in the auto before it was towed away. The search of the trunk produced the marijuana that resulted with Defendant's being charged with possession with intent to deliver in File No. A-507-77. It should be added that Defendant at no time consented to the search of the vehicle.

Defendant has raised two questions regarding the two searches. First, did the officers have a right to search the interior of the vehicle after observing a folded knife in the car? Secondly, was the forcible opening of the trunk lawful after the Defendant had been arrested?

The Court has had an opportunity to review the briefs submitted by both parties and the law involved. In *People* v *7th District Judge*, 55 Mich App 471, the Court stated:

"The legality of a search conducted without a warrant depends upon the law's appraisal of its reasonableness. Probable cause is the test. It is not suspicion but rather stems from some fact, circumstance, or information which would create an honest belief in the mind of a reasonably prudent man. In determining probable cause, this Court is limited to the facts, circumstances and information known to the officer at the time of the arrest and seizure

. . .

"Cases and factual situations differ and each case becomes unique. In assessing reasonableness we are required to consider the pertinent facts known by the officer. What is reasonable under the circumstances results in a subjective evaluation. Does the search, in this case, meet the standard of reasonableness established by the US Const, Am IV, unreasonable searches and seizures? . . .

The events leading up to the seizure of the pouch were unique. The Defendant was pursued by the deputies for speeding. In bringing his vehicle to a stop he went partially into a shallow ditch along the roadway. He then exited his vehicle leaving the driver's door open and the interior light on and met the deputies at the rear of his vehicle. He had to be asked twice for his driver's license before he produced it. The deputy further testified that the Defendant appeared to be "under the influence of something". At this point the Defendant was asked twice for his registration and proof of insurance. Without any explanation, the Defendant started walking toward the open door of his vehicle. The deputies followed and it was at this point that they saw the knife on the floor. The Defendant was then frisked which was consistent with *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L.Ed. 2d 889 (1968). After the knife was confiscated and before allowing the Defendant back into the interior of the car to

get the registration, the deputies conducted the search which produced the pouch. After a review of the facts involved in this search, it is the Opinion of the Court that the deputies acted reasonable in conducting a search of the vehicle.

The reasons for the search of Defendant's trunk seem to be two-fold: (1) that it was incident to a lawful arrest; and (2) that the Officer was conducting an inventory search. It is fundamental that an officer may not search an individual's automobile based on a traffic stop alone. In *Peo.* v *Small*, 67 Mich App 580, the Court allowed a warrentless search of a Defendant's trunk based on *Chimel* v *California*, 395 US 752; 89 S Ct 2034; 23 L.Ed. 2d 685 (1969) and held that such a search was proper when incident to a lawful arrest. In *Peo.* v *Clark*, 5 Mich App 672 (1967), the Court held that:

> "Seizure of incriminating evidence incidental to lawful arrest is proper so long as the search and seizure is reasonable."

As stated earlier in this Opinion the circumstances surrounding this traffic stop and arrest were indeed unique. All the factors surrounding the incident lead to the reasonableness present when the deputy searched the trunk of the Defendant's car as an incident to lawful arrest.

Moreover, the policy testified that it was the department's policy to check a vehicle to insure that nothing valuable can later claim to have been stolen. The Court is satisfied from the testimony that the intrusion into the trunk constituted an inventory search pursuant to *Gambino* v *United States*, 275 US 319; 72 L.Ed. 293; 48 S Ct 137 (1927). Accordingly, it is the Opinion of the Court that the search of Defendant's trunk was proper.

It is the finding of the Court that the crimes as set forth in File No. A-506-77, A-507-77 and A-508-77 have been committed and there is probable cause to believe the Defendant committed them and he is bound over to the Circuit Court.

KENNETH A. HANSEN /s/
District Judge

Dated: December 28, 1977.

**INFORMATION**

**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT FOR THE**
**COUNTY OF BARRY**
County of Barry

| | |
|---|---|
| THE PEOPLE OF THE STATE OF MICHIGAN<br>vs.<br>DAVID KERK LONG | CASE NO.<br>DEMING<br>78-100-FY |

Date of Offense On or about, to-wit: August 25, 1977
Location Township of Orangeville, Mullen Road
Complainant George Howell
Complaining Witness George Howell

WITNESSES (*Preliminary Exam)
George Howell, Ricky Lewis, Nancy Wagner, William Brake

STATE OF MICHIGAN }
County of Barry } ss.

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, Now comes the Prosecuting Attorney in and for the said County, State of Michigan, who prosecutes for and on behalf of the People of the State of Michigan, in said Court in the current term thereof, and gives the said Court to understand and be informed that the above-named Defendant(s), heretofore on or about the DATE OF OFFENSE set forth above, at the LOCATION set forth above, in the said County, State of Michigan.

David Kerk Long of 159 North Park Drive, Grand Rapids, Michigan, did then and there possess with intent to deliver a certain controlled substance, to-wit: Marijuana; Contrary to M.S.A. 28.1070(41)(1)(c).

Punishable by imprisonment in the State Prison for not more than 4 years or by a fine of not more than $2,000.00 or by both such fine and imprisonment.

and against the Peace and Dignity of the People of the State of Michigan.

JAMES H. FISHER /s/
Assistant Prosecuting Attorney

(3) • • •

THE COURT: In 78-100-FY, this will be the pre-trial order. Each of the parties have indicated they're ready for trial. The trial is set for Monday, May 8th, 1978, at 9:00.

The Prosecutor intends to offer as to the physical exhibits a leather pouch, two large bags of marijuana, 3 small bags of marijuana, one large folding Browning knife.

The Prosecutor indicates he has no written statements signed by or given by Defendant. He indicates he has (4) no verbal confessions or admissions by the Defendant.

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*Barry County Circuit Court — Denial of Motion to Quash and Suppress (April 28, 1978)*

(3) • • •

The Court has had the opportunity and—to read, in the Court's opinion, a real good brief on the part of the defendant, and a real good brief on the part of the People, and a good reply brief on the part of the defendant. It's enjoyable to read good briefs. The Court has studied them, and it appears that in this case, there was a warrant and search of an automobile which was being driven by the defendant (4) of some 71 miles an hour at 12:05 in the morning.

It appears that the police officers observed the—the defendant exceeding—as far as this Court is concerned—extremely exceeding the speed limit, and that subsequently, at least the front end of the defendant's automobile ended up in the ditch, and the defendant's automobile was crossways to the road, and as I remember the transcript the—the police were satisfied that that was the automobile that they had observed going some 71 miles an hour.

When the police got there, the defendant exited the automobile, and the door of the automobile remained open after the defendant exited it. When the police officers asked the defendant for his registration certificate and proof of insurance, the—the defendant—at least the proofs were, that the defendant started towards this open door of the automobile, and at that time, the police officers observed a large folding knife on the floorboard of this automobile. At that time, the defendant was detained and a search was made of the defendant's person for weapons and a search was made of the automobile for weapons.

Now, in making this search for the weapons, the—the leather pouch was found, and as the Court remembered the testimony, it was—it was a split-bench type of a front seat, and that because it is—it was a split-bench, then there's an arm rest that folds down on the passenger side of the driver, and this leather pouch was beneath that, and yet it was visible, as I remember the testimony.

(5) The officer removed the leather pouch, and as I remember, it was open, and the officer found a material which was not unlike marijuana. And also in this leather pouch, there was a vial, and it contained a white powder. The powder was something not unlike cocaine. And there was also a pill in some sort of a metal foil. This was seized by the officer. Then subsequently, the officer found two large bags of what appeared to be marijuana in the trunk of this automobile.

Now, to determine the motion of the defendant in this case, the Court must determine whether the search was reasonable or not, and I'm satisfied the officers were justified in searching the automobile for their own protection. They observed this large knife and that they believed the defendant was under

the influence of something from his actions. As I remember, he refused to say anything. When they asked him for his driver's license, I think he didn't say a thing.

I'm satisfied that with the condition of the defendant, as viewed by the officers, his movement towards the automobile, and the view of the large knife, caused the officers to be apprehensive for their own safety, and therefore, they could make a search for weapons within the immediate surroundings of the defendants.

I'm satisfied that this leather pouch could have contained a weapon, and therefore, was ample reason for the police officers to examine. I find that the officers examined in a reasonable manner and that the contents of the leather pouch were properly admitted into evidence by the Examining (6) Magistrate. The District Judge held that the intrusion into the trunk constituted an inventory search and such was permissible. From my review of the testimony of the officers, and there was testimony to the effect that the examination of the trunk was made for the purposes of determining what valuables were contained in this automobile, and the officers didn't use the chosen words of inventory, but I'm satisfied when the officers said that they're concerned about valuables, that they meant inventory. I'm satisfied that that's why the trunk was opened.

So, I'm satisfied from the reading of the preliminary examination transcript that there was reasonable cause for the police to open the trunk, and I'm satisfied that the Magistrate did not abuse his discretion in admitting evidence of the contents of the trunk.

The defendant was the only person within the—the defendant was the only person within this automobile, and we

know from *People* v *Ridgeway*, 74 Mich App 306, a 1977 case, in which they cite *People* v *Gould*, 61 Mich App 614, a 1977 case, that the presence in or control over a vehicle in which a substance is found is of possession of the substance.

There was a large quantity of marijuana within this vehicle. With the benefit of *People* v *Serra*, it is 55 Mich App 514. which states that, and I quote, "Prosecutions involving large amounts of marijuana will not require a presumption to convince a jury that the possessor intended something other than personal use. The inference may follow (7) of its own force."

By binding the defendant over, the Magistrate so found the question of probable cause is primarily one for the consideration and determination of the Examining Magistrate. This Court may not substitute his judgment for that of the Magistrate except when there is a clear abuse of discretion or that a clear abuse of discretion is apparent.

I'm satisfied from what I have said and from the facts that I have found, that this Court determines and this Court determines that the Magistrate did not abuse his discretion, and the motion of the defendant to quash the information and/or suppress the evidence is denied.

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*Barry County Circuit Court — Motion in Limine (August 28, 1978)*

(71) • • •

MR. JERKINS: The first motion I have is a motion in limine or a motion to strike from the information the address which is in the information. It says, David Kerk Long—and this would be the beginning portion of it—of 159 North Park

Drive, Grand Rapids, Michigan, then, did then and there— I see where that is not necessary for the prosecution to have in the information. In fact, if anything, I suppose it might even pose a proof problem, because that would then have to be an element to show that David Kerk Long resides at 159 North Park Drive, Grand Rapids, Michigan. And, on the other hand, if anything, it might be construed to be prejudicial to try to influence the jury that here is a man who is outside of our community who is charged with this crime, and I think that in order to simplify all matter, (72) if the information just deletes that paragraph which begins: of 159 North Park Drive, Grand Rapids, Michigan, I think that solves that particular problem.

MR. FISHER: No objection, your Honor.

THE COURT: The address that is contained in the amended information is striken.

MR. JERKINS: Thank you, your Honor.

Now, the other motion I have is also a motion in limine which—so that, again, we do not run into any problem during the course of the trial, and that is, the Court is well aware that my client is also charged with two other crimes. He's charged with Possession of Cocaine and Possession of a Quaalude pill, both of which arise out of a pouch that is found in the vehicle, and I would ask the Court to rule that there should be no reference made to these items contained in the pouch, and in fact, I believe there should be no references made to the pouch in the presence of the jury. Again, it has nothing to do with the substance of this particular charge. If anything, it would be nothing more than a prejudicial effect upon the jurors. I think that if the prosecution is concerned as to the record as to the stopping and the arrest of my client,

that there is a way that that can be handled, and that would be to excuse the jury so that testimony could be taken out of the presence of the jury as to what the officers did pertaining to the pouch (73) so that the record would be clear in that regard. But as far as the jurors hearing anything about the pouch and the contents of the pouch, it would be more prejudicial than it would be probative in this situation, and, of course, the Court has already ruled in the past for a separation, stating that it agreed with counsel that this would be prejudicial if it were part of this trial. So, in order to have a clean record, I think that we should get that cleared up before we get into the actual testimony in the trial.

THE COURT: Thank you.

Mr. Fisher?

MR. FISHER: Well, your Honor, I agree with part of Mr. Jerkins' motion. There is a pouch which we do intend to introduce in evidence in this trial. The pouch contained a pill which was later analyzed to be a Quaalude, a controlled substance, as well as a vial containing a small amount of what was analyzed to be cocaine; but it also contained a bag of marijuana, which is the charge with which we are concerned in this trial, and I intend to introduce the pouch into evidence and intend to introduce the fact that marijuana was found in that pouch. I do not intend to make any reference to the other controlled substances that were found in the pouch. But I do think that it's necessary for the prosecution of this case, the jury have the information that that pouch was found next to the driver's seat, since this is a (74) specific intent crime. They should have all available evidence which may have bearing upon the defendant's intent.

THE COURT: Thank you.

Mr. Jerkins?

MR. JERKINS: Except, your Honor, I would point out, that's not what we're trying here, because the prosecution all throughout all prior proceedings, preliminary exam and motions here in Court, has always led counsel and the Court to understand that the basis of this charge are those items which were found in the trunk of the vehicle, which are two particular sacks of marijuana. At no time has he alleged that marijuana, a small quantity—a very small quantity, as a matter of fact, that was contained within the pouch was the substance of this, and in fact, that even belies his whole theory, because the reason he is charging more than simple possession and that he is charging intent to deliver is based on the quantity, and the quantity is that which was in the trunk, not having anything to do with that which is within the particular pouch. And for that reason, your Honor, I—I don't find that as part of this case. There's no connection, even. In fact, it puts a tremendous burden on the prosecution, and if the Court would allow him to use that marijuana which is within the pouch, then I believe the Court, likewise, has to say to the prosecutor, you had best connect up the marijuana that's found within that pouch to the marijuana (75) that's in the trunk, otherwise, at that point, what is coming in is more prejudicial than it is probative.

THE COURT: There is no question that anything in the—in this pouch that would be called cocaine or anything called another substance other than marijuana, obviously, may not be introduced before the jury, and the question becomes whether or not marijuana that was found—I notice in your pre-trial statement that you intend to offer two large bags of marijuana, and then you stated three small bags.

MR. FISHER: That's correct, your Honor. The—

THE COURT: Is one of the small bags included in this leather pouch?

MR. FISHER: Pardon me? No, what the other two small are samples that were taken out of the large bags and transmitted to the Michigan State Police Crime Detection Laboratory for analysis.

THE COURT: Is that it? There are three small bags?

MR. FISHER: That's correct. One of those three was one that was found in the leather pouch. That small bag was taken to the Crime Lab for analysis. Then the other two small bags contain samples taken out of the two large bags, which, then, those two small bags were also taken to the Crime Lab for analysis.

THE COURT: Well, Mr. Jerkins, it's obvious from the pre-trial statement, as this Court visualized it, anyway, (76) that the defendant had reason to believe that the small bag of marijuana was part and parcel of this offense, because it's listed as one of the physical exhibits.

MR. JERKINS: We're not claiming surpise, your Honor. We're not claiming that at all. What I'm claiming is that he has always, throughout even the preliminary transcript and so forth, contended that the basis of this charge is the large quantity which is within the trunk. He is not charging my client with just the ordinary charge of possession. I would concede the point that if all we are talking about was possession of marijuana, then I could not raise this issue. But since he is talking of the charge of Possession with Intent to Deliver, which, obviously, is totally different, and he's relying on the quantity in the trunk, then the small quantity in the car has nothing to do with that, and that's the difference, and

that's the distinction that I am making and pointing out: that if—if he's allowed to do that, then he had best be prepared to connect that small amount that's in the pouch to the large amount that's in the trunk, because if he can't connect it, then what is the relevancy and materiality and the point of having it come in other than to have a prejudicial effect.

THE COURT: Thank you. I'm going to give each of you gentlemen an opportunity to just give me a little—a little letter brief on this so that I can have it tomorrow (77) morning, then I'll be prepared to rule on that.

MR. JERKINS: I take it, at this point, you have ruled as far as the quaalude and cocaine, that's out?

THE COURT: Absolutely.

MR. FISHER: I have no objection to that.

THE COURT: Thank you.

*Barry County Circuit Court — Motion to Suppress (August 28, 1978)*

MR. JERKINS: I do have one other matter I forgot. I misspoke when I said two. I have a third one. This one goes to the legal. The Court will recall that I filed a motion to suppress, and we both filed briefs before your Honor, and the Court rendered its decision in regards to my motion to suppress last April—April 28th, 1978. I would like to call to the Court's attention that since then, there have been some cases that have come out that I think may cause the Court to reconsider and possibly grant my motion, and as a result, further proceedings in this matter would not be necessary. I call to the Court's attention a Michigan Appeals decision, which is *People* v *Garcia*—that's G-A-R-C-I-A—81 M[illegible]an

Appellate. Now, at that—or in that particular case, your Honor, this, again, is a traffic stop. This, again, is a factual situation where the individual was out of the vehicle, as we find in this case. The individual was frisked for weapons, and at that point, the officers proceeded even beyond that and charged Mr. Garcia with possession of—I believe it was cocaine in that (78) particular case—and the Court of Appeals ruled that after a traffic stop and after frisking the individual so that the safety of the officers has been determined, that any further search is contrary to the law, is impermissible, and anything that is found thereafter is subject to suppression and should have been, ergo no conviction, and that's what that case holds. That case is almost directly on point with this case here, and I call that to the Court's attention because we have had a case stay that came down subsequent to the decision of this Court, so the Court did not have that available nor did either counsel have that available.

I also would call to the Court's attention another case that has come down since then. It's a Federal case, and it's a rather well-reasoned case, and it's, again, one that goes to the Terry-type search, which, again, we have in this case, which also speaks as to the *Pennsylvania* v *Mimms* case which also applies in this situation, since they both go to searches of individuals by vehicles and how far one can proceed. This particular case is called *Canal Zone* v *Bender*—B-E-N-D-E-R. It's Capital C capital A—and I don't have—capital C capital A 5, and its dated 6-2-78. Probably what I can do is give the Court a Zerox of the Criminal Law Report which I have which came out on July 26th, 1978, which is 23 Crim Law, page 2,359, and I can give the Court what I have which we have received which speaks to this particular (79) point, and at this particular case, what we're talking about here is the officer had the two men in the car exit the car, and after they had positioned themselves between the men and the car, then the officer, as the

Court said, went too far by poking their head into the vehicle looking for weapons, and then they subsequently found a pot-filled frisbee under the front seat. And the Court ruled there that this is too far; that under the circumstances, searching the vehicle was not reasonably necessary to the accomplishments of the goal. And I cite that again, showing that the—the Court's are saying that the exception to the warrantless search has to be shown very clearly. There has to be necessity and that we start from the presumption that any warrantless search is illegal unless it falls within one of the exceptions, and that's what the Court is saying, and I submit that those two cases are recent cases which further buttress our position in this particular case.

THE COURT: Thank you, Mr. Jerkins.

Mr. Fisher?

MR. FISHER: Well, your Honor, I am not familiar with those cases, and since the ruling does depend on the specific factual situation, I can't really respond at this point. I would like an opportunity to perhaps submit a short brief to the Court tomorrow.

THE COURT: Thank you very much. You'll have an (80) opportunity to read those between now and tomorrow morning.

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**PROCEEDINGS OF JURY TRIAL**
**AUGUST 29, 1978**

(117) • • •

Yesterday, the Court took under advisement a couple (118) of motions of Mr. Jerkins'. The first motion had to do with the motion in limine to deny the prosecutor the right to bring in testimony that a leather pouch yielded a small plastic bag of what they claim to be marijuana. The Court read carefully the two cases which were cited by Mr. Jerkins, the one being *Canal Zone* v *Bender*. Mr. Jerkins was kind enough to give the Court a photocopy of the Criminal Law Report of this case. And Mr. Jerkins also cited the case of *People* v *Garcia*, which is in 81 Michigan Appeals 260, which is a 1978 case. The Court carefully reviewed each of these cases. The *Bender* case, this was a case that—down in the Canal Zone, and apparently, a couple of police officers observed a couple gentlemen sitting in an automobile. The gentlemen exited the automobile. The—the—as I remember, the police did not conduct a patdown or anything, and the Court believed that there was no reason for them even to search the car.

The *Garcia* case was a case where a person made a left-hand turn, got out of a car. The—again, the police patted down the guy—I guess that's a good word—patted down the defendant.

Now, in this case, there was a patdown of Mr. Long, and in this case, Mr. Long started towards the car, and at that time, the police observed a folding knife laying on the floorboard near the outward edge of the seat. Now, at that time the police did conduct a patdown search. The facts are (119) completely different in each of these two cases. Because of that, the Court will allow the evidence to be presented. The

*Barry County Circuit Court — Jury Trial — Motion to Suppress Denied*

Court also, as I've stated in an opinion I wrote, that there was also a search of the car for inventory for valuables. The Court is satisfied that this is a marijuana case and this evidence of marijuana may be used to show motive or intent, and it's of a like act, and the Court is satisfied that the probative value outweighs any prejudice which may occur to the defendant.

Return the jury, please.

• • •

*Barry County Circuit Court — Jury Trial — Directed Verdict on Charge of Possession with Intent to Deliver*

THE COURT: is satisfied that the opening statement made by the prosecutor failed to disclose to the jury the facts and neglected to use to show possession—strike that—intent to deliver the controlled substance, and the motion of Mr. Jerkins is granted to that extent. However, the Court is not going to dismiss the entire case as requested by Mr. Jerkins. The Court is satisfied that the opening statement of the prosecutor included the lesser included offense of possession of a controlled substance.

You may return the jury.

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(126) • • •

DIRECT EXAMINATION
By Mr. Fisher:

Q. State your name, please.

A. George Howell.

Q. What's your occupation, Mr. Howell?

A. Deputy Sheriff, Barry County.

• • •

Q. How long have you been so employed?

A. I have been with Barry County, this time, almost eight years. I've been with three—three years with the Detroit City Police prior to employment here.

Q. Now, Deputy Howell, directing your attention to the morning of August 25th, 1977, do you recall what shift you were working that day?

(127) A. Yes, sir. I was working from eleven at night 'til seven o'clock in the morning. That would be eleven o'clock on the 24th of August 'til seven A.M. on the 25th of August.

Q. Do you recall where you were shortly after midnight that morning?

A. Yes, sir. I was in a parked cruiser. I was driving southbound on Norris Road and I was south of Keller Road. Deputy Lewis was my partner.

Q. Pardon me?

A. Deputy Lewis was my partner. He was riding with me.

Q. And what township were you in at that point?

A. That would be Orangeville.

Q. Is that in Barry County?

A. That is correct.

Q. Did anything happen that caught your attention?

A. Yes, sir. As I stated, we were southbound. We met an oncoming car, a car that was driving towards us in the northbound lane. We were equipped with a moving radar unit. It tripped our radar at 71 miles an hour.

Q. What did you do at that pont?

A. At that point, as the vehicle passed us, tried to make an observation of the vehicle, some type of description. I turned around in a driveway and attempted to catch the vehicle.

Q. Could you tell what kind of car it was as it went past you?

(128) A. No, sir, I could not tell the make of the car. It appeared to be a Dart, possibly dark green. The passenger– as it went by, I looked in my sideview mirror. The passenger side taillight on the vehicle, the outward portion, was broken so that there was partially red light and partially white light on the taillight on the passenger side.

Q. Could you tell how many people were in the car as it went past?

A. As it went past, it appeared to me to be one. I could—

Q. One person other than the driver or just the driver?

A. No sir. It appeared to be the driver only.

Q. Pardon me? I didn't hear you.

A. It appeared to be the driver only.

Q. Now, as you turned your car around at this—and got headed in the same direction as this car, were you—did you have it in sight at that point?

A. At that time, I had it in sight. Shortly thereafter, I lost sight of the vehicle. It's quite hilly in that area, and curves.

Q. And for how long a period of time did you lose sight of the car?

A. It would be seconds. Exactly how long, I could not tell you.

Q. Well, about how many seconds was it? two or three? or was it thirty or forty?

A. Probably five—five to ten seconds, somewhere in that area.

(129) Q. And where did you next see this car?

A. At this time, after I turned around, we were northbound towards Keller Road. There are some curves right there before you get to Keller Road. I went through the curves. I again picked the vehicle up in sight as it was crossing Keller Road and it was headed northbound on Norris Road, yet. There is a long hill that goes up. When the vehicle reached the top of that hill, I momentarily lost sight of it. I was gaining on the vehicle. As I approached Mullen Road, I again picked up the taillights of the vehicle. The vehicle made a left-hand turn onto Mullen Road. At that time, the vehicle would be westbound on Mullen Road and I was northbound. There are some trees, some shrubbery. I could not make the vehicle out clearly. It appeared that the vehicle swerved. As I approached Mullen Road, I made a left-hand

turn onto Mullen Road. The vehicle was sitting crossways in the road. The front of the vehicle would be in the ditch on the north side of the road.

Q. Were there—while you were trying to catch up with this car, did you cross any other—come across any other traffic?

A. No, sir, there were none.

Q. Did you see any other cars on the road at that time?

A. No, sir, I did not.

Q. What did you see when you arrived at the scene? Did you get out of the car, then?

(130) A. Yes, sir. After making the turn—the vehicle crossways in the road was approximately a hundred and fifty feet west of the intersection—pulled up to the vehicle. Our headlights were approximately from here to the—excuse me—the large doors there. We had our bright lights on. I turned my overhead lights on. We got out of our vehicle. The driver of the vehicle was sitting in the driver's seat.

Q. Could you see anyone else in the car?

A. No, sir. There was no one in the car. We observed no one in the area. I observed no one in the area.

Q. And did you have contact with the driver of the car, then?

A. Yes, sir. Upon exiting our cruiser, we walked towards that vehicle. The driver of the car got out of his vehicle and walked to the rear of his vehicle by the trunk, and that's where we met him.

Q. What type of a car was it?

A. It was a '72 Mercury two-door. I believe it was a Brougham, '72 Mercury Brougham.

Q. Do you see the driver of the car in the Courtroom today?

A. Yes, sir, I do. He's the gentleman with glasses, suit on. (indicating)

Q. Thank you. Did you ask the defendant for his driver's license?

A. Yes, sir. When he met us at the trunk, he did not say anything, and I asked him for his driver's license. He didn't (131) respond or didn't move to get his license; he just stared at me. I asked him again for his license. He waited a few seconds, then he reached and got his wallet and got his license out and gave it to me.

Q. Did you then ask for the registration for his car and proof of insurance?

A. Yes, sir. I looked at his license and asked him for the registration for the vehicle and his proof of insurance. He did not say anything. He did not move. He just looked at me. I again asked him for the registration and the proof of insurance for the vehicle. At this time, he turned around and walked around the driver's side back fender and started walking towards the driver's door of the vehicle, which was open. Approximately in the area of the rear tire, I observed a knife lying on the floorboard of the vehicle. I was behind Mr. Long—

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THE WITNESS: I observed a knife laying on the floor of the vehicle. I was behind Mr. Long. My partner, Deputy Lewis, would be to the left of Mr. Long.

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(132) Q. I'm showing you an object marked—which has been marked as People's Proposed Exhibit Number 1. Can you identify that?

A. Yes, sir. This is the knife Deputy Lewis picked up from the trunk. It's the one I observed laying on the floorboard.

• • •

Q. That's a folding knife, Officer Howell. Was it opened or closed at the time you saw it?

A. Was it opened or closed?

Q. Yes, when you saw it on the floor.

A. It was closed.

Q. It was closed?

A. Yes, sir.

Q. Did you—what did you do after you picked up the knife?

A. I did not pick it up. Deputy Lewis picked it up. When I saw the knife, I said, "Hold it." And I believe, to the (133) best of my recollection, I put my hand on his shoulder —that would be Mr. Long's. I told him to step to the car, and I believe I kept my hand on his shoulder; told him to put his hands on the top of the car. This would be at the—near the back window—

Q. Okay. Officer Lewis picked up the knife, then?

A. Yes, sir, at that time.

Q. Then did you look inside the front seat after Officer Lewis had picked up the knife?

A. Yes, I did.

Q. And how did you do that?

A. I walked—

Q. Did you have a flashlight in your hands?

A. Yes, I did. I walked to the open door of the car and shined my light inside the car.

Q. And did you see anything that caught your attention at that point?

A. There was some papers on the front floorboard. There was the—the vehicle's equipped with armrests. The armrests were down. They were located in the middle of the front seat. There was something underneath the armrest. I reached in and I lifted—let me clarify. The vehicle is equipped with a bench seat, not bucket seats, but bench seat. However, they are split. They are independent of each other. One, the driver's seat can move back and forth, and the passenger (134) seat can move back and forth, and both of them have an armrest. However, they are right together. One can be up or down or both can be up and down. They were both down. I reached and I lifted up the armrest—it would be on the driver's side.

Q. Before you lifted up the armrest, did you see something there?

A. That is correct.

Q. What could you see?

A. I could not be sure.

Q. What did it appear to be to you?

A. It appeared as though it may have been something leather. I could not tell. The armrests were all the way down.

Q. So, then you lifted up the armrest?

A. Yes, sir. It was sticking towards—it was sticking out a little bit on the driver's side, so I could see it. I lifted up that armrest on the driver's side. It was a leather-type pouch, longer than it was wide, if it was closed. The pouch was open. It was unfolded.

(At about 11:06 A.M.—Proposed PX 2 marked by reporter)

BY MR. FISHER:

Q. I show you what's been marked as People's Exhibit Number—Proposed Exhibit Number 2. Can you identify that?

A. Can I take it out of the bag?

(135) Q. Yeah.

A. Yes, sir. This is the bag—excuse me—this is the bag that was in the front seat of the car.

Q. That was open when you picked it up—or when you first saw it?

A. Yes, sir. It was unfolded.

• • •

Q. What did you see—did you see anything besides the pouch when you lifted up the armrest?

A. Yes, sir.

• • •

(137) • • •

Q. Now, Officer Howell, when you lifted up the armrest, did you see anything other than this leather pouch, which you've testified before?

A. Yes, sir. The leather pouch was underneath the armrest. This side would be towards the passenger side of the vehicle, and in this compartment, sticking out there, was a plastic bag, similar to a plastic sandwich bag, and there was a greenish-brown material, plant-like, I observed, suspected of marijuana.

Q. Have you ever seen marijuana before?

(138) A. Yes, sir, I have.

Q. How many occasions?

A. Many.

Q. Many?

A. Number-wise?

Q. Do you have an estimate?

A. Over a hundred.

Q. Have you ever smelled marijuana?

A. Yes, sir, I have.

Q. What did you do with the bag after you observed it?

A. After I observed it in the vehicle, I picked up the pouch, removed it from the vehicle, and I took the plastic bag out of the pouch.

Q. What did the contents of the bag look like to you?

A. They looked like marijuana to me.

Q. Did you open the bag?

A. Yes, sir, I did.

Q. Did you smell it?

A. Yes, sir, I did.

Q. What did it smell like?

A. It smelled like marijuana.

• • •

(139) BY MR. FISHER:

Q. Officer Howell, I'm handing you what's been marked as People's Proposed Exhibit Number 3. Can you identify that?

A. Yes, sir. This is the plastic bag which was in the leather pouch.

Q. What did you do with that—that bag after you removed it and looked at it and smelled it?

A. I removed at it—correction—I removed it and looked at it, asked my partner to look at it. I then put it back in the pouch, advised subject he was under arrest. I believe I stated, "You're under arrest for grass," my exact words. I then put the pouch—leather pouch containing the marijuana—suspected marijuana in my back pocket.

Q. And how long did it remain in your back pocket?

A. It remained in my back pocket until I gave it to Deputy Lewis at the Sheriff's Department.

Q. And how long after the—after the traffic stop was this?

A. I believe it was between two and two-thirty sometime.

Q. Was a field test performed on it by anyone?

A. Yes, sir. I observed a field test performed by Deputy Lewis.

Q. Where was that performed? At the Sheriff's Department?

A. That was performed at the front lobby.

Q. Of the Sheriff's Department?

A. It is not—it would be the office area, which is close to the lobby, where people can come in. It was in the office (140) area at the Sheriff's Department.

Q. Thank you. After you told the defendant he was under arrest, what did you do next?

A. At that time, I checked the interior of the vehicle for further contraband.

Q. What were you going to do with the car?

A. Impound it.

Q. Did you call a tow truck?

A. Later, I did.

Q. Did you do something with regard to impounding it before calling for a tow truck?

A. Yes. After checking the interior of the car, upon getting out, I observed that the ignition key was not in the ignition. It has a lock steering column, and the wheels were not straight. Also, it was in park, which is locked. I exited the

vehicle, walked back from where Deputy Lewis was standing with Mr. Long, back by the trunk—it would be on the side of the car near the trunk. I asked Mr. Long for the keys for the vehicle. He handed me a single ignition key. It was not on a ring. I then asked him if he had a key for the trunk and he stated, "I have no key."

Q. Did the trunk have a lock on it?

A. As I walked to the rear of the trunk, I observed that the trunk lock had been punched out. All there was was a hole. Also, there was two hand prints on the trunk, in the dust.

(141) Q. Did you—you say you opened—did you say you opened the trunk or—

A. Yes, I did.

Q. How did you open it?

A. I stuck my jackknife in the hole and tripped the latch.

Q. What was your reason for checking the trunk?

A. Okay. For—as I stated, we were going to call a tow truck We checked—I checked the vehicle for any type of valuables that a person we lodged may be claimed to be stolen from the vehicle. Also, for further contraband.

• • •

BY MR. FISHER:

Q. Officer Howell, there are two large bags here, which I'm not going to hand you to identify, but they're sitting on the floor here in front of you. They have been marked as People's Proposed Exhibits 4 and 5. Can you identify those objects?

A. Could I get off the stand and check them?

Q. Yes.

A. Yes, sir. Those bags were in the trunk of the vehicle.

Q. They are now split open Were they in that condition when you first saw them?

A. Yes, sir, exactly that condition.

Q. And did you see what the contents of the bag contained?

(142) A. Yes, sir. I shined my flashlight on them. They also appeared to be suspected marijuana.

Q. Did you smell it?

A. Pardon?

Q. Did you smell it?

A. Yes, sir, I did.

Q. What did it smell like?

A. Marijuana.

Q. What was done with these bags after you observed them in the trunk of the car?

A. Okay. The bags were left in the trunk of the car. We removed the subject to our vehicle, placed him in the vehicle. The wrecker was called. After the wrecker arrived, we followed the wrecker as it towed that vehicle to the Sheriff's Department.

Q. Was the trunk of the car opened or closed while the bags were taken into the Sheriff's Department?

A. It was closed.

Q. Was anything added or taken out of the bags before they got to the Sheriff's Department?

A. No, sir.

Q. What happened to the bags after they got—you got the car back to the Sheriff's Department?

A. Okay. Deputy Lewis—we have an underground garage at the rear of the building. The wrecker driver drove to that area. (143) I let Deputy Lewis out of the vehicle, asked him to secure the vehicle in the basement, and I would be down shortly. I then took Mr. Long to our security garage, took him inside and gave him to the booking officer and then met Deputy Lewis in the basement.

Q. Did anyone take samples from those bags that evening?

A. Yes, sir, Deputy Lewis.

Q. And where did the bags stay after the samples were taken?

A. The bags were—stayed in the trunk of the vehicle, which was locked in our garage downstairs.

Q. And were they transported from that car, then, after that, sometime?

A. Yes, sir. As soon as the Undersheriff arrived in the morning, the bags were turned over to him and locked in our evidence room.

Q. And did you observe the bags being locked in the evidence room?

A. Yes, sir, I did. I personally carried them in. The door was locked.

Q. When did you retrieve the bags from that room?

A. Yesterday, and then I took them back, turned them back over to the Undersheriff, and then I retrieved them this morning.

Q. Did you weigh those bags when you—

A. Yes, sir, I did.

Q. What was the weight of each?

(144) A. If I remember right the weight of both bags—they were weighed on a bathroom scales. The weight of both bags totaled between seventy and seventy-five pounds.

MR. FISHER: I have no further questions at this time, your Honor.

THE COURT: Mr. Jerkins, cross examination?

MR. JERKINS: Thank you, your Honor.

CROSS EXAMINATION
By Mr. Jerkins:

Q. Officer Howell, as I understand your testimony, you and Officer Lewis were on patrol on Norris Road. You were driving south. Now, were you on some kind of a call or were you just driving down that road at the particular time that this incident occurred?

A. I believe we were on our way to a complaint.

Q. We were what?

A. On our way to a complaint. In other words, somebody had called.

Q. All right. So, you were going somewhere to perform some sort of duty, correct?

A. Yes, sir.

Q. And as I understand your testimony, then this vehicle passed you going the opposite direction and you noticed on your radar that it was speeding?

A. That is correct.

(145) Q. All right. At that point, then, as I recollect your testimony, you stopped your vehicle, turned around and eventually saw this vehicle with a tire in the ditch?

A. Yes, sir. The front end was in a shallow ditch.

Q. All right. As I also understand your testimony, when you pulled up, that's when you first activated your overhead lights.

A. That is correct.

Q. All right. In any event, what that means, then, you weren't chasing the vehicle; you didn't have your lights on when you were chasing it or pursuing it. Is that correct?

A. I did not have my lights on when I was attempting—

Q. Your overhead lights, what's known as the flasher or overhead light.

A. When I was attempting to catch the vehicle, I did not have them on, no, sir.

Q. All right. When you approached the vehicle, I believe you stated that the individual got out of the driver's side and walked towards your vehicle; is that true?

A. He—as we pulled up—we would be facing the passenger side of the vehicle—he got out of the driver's side, which was away from us, and walked to the rear of his vehicle —his vehicle.

Q. Walked to the rear of the vehicle?

A. Yes, sir.?

(146) Q. All right.

A. That's where we met him.

Q. That's where you met him? In other words, he was walking towards you, then?

A. Well, he got to the rear of the vehicle and stopped before we got up to him.

Q. Right. Because you were walking towards him, then?

A. That is correct.

Q. All right. Now, after you had talked to him, you stated then he started back towards the vehicle and you started right behind him; is that correct?

A. Yes. I asked him for the registration and proof of insurance.

Q. Right. And it was at this point where you stated you saw Exhibit 1, which is a knife, on the floorboard; is that correct?

A. Yes sir, that's true.

Q. All right. Now, at that point, you stopped him, didn't you?

A. Yes, sir, that's true.

Q. All right. Now, at that point, you stopped him, didn't you?

A. Yes, sir.

Q. All right. And as you've testified, Officer Lewis, who was with you, picked up this particular knife off the floorboard; is that correct?

A. That is correct.

Q. Now, also on this floorboard in the car, you mentioned you saw some papers. And isn't it also true that there were other tools that were on the floor?

(147) A. No, sir.

Q. Well, did you see any tools in the car?

A. I believe in my testimony at District Court—

Q. No, I just asked you if you saw any; I didn't ask you what your testimony was.

A. To the best of my recollection, saying there may have been some in the back of the floorboard.

Q. So, you're saying there were some other tools, then, that were in the car, but you believe they were in the back seat floor area?

A. Possibly, yes.

Q. Pardon?

A. Possibly.

Q. All right. Now, at the time that you stopped him and Officer Lewis picked up the knife, isn't it also true that you told him to lean up against the car and you proceeded to search him?

A. Yes, sir. I had my hand on him.

Q. All right. And you searched him at that point, didn't you?

A. I frisked him, yes.

Q. And you were searching him to see if he had any weapons or anything on him, is that correct?

A. Yes, sir. I frisked him to see if he had any weapons.

Q. And you found none, is that correct?

A. That is correct.

(148) Q. All right. Now, after you did this, and after Officer Lewis had the knife, is it at this point that you then decided to search the vehicle?

A. Yes, sir. I wanted to look in the vehicle—

Q. All right.

A. —and see if there were any—

Q. All right. That's what you did, then. You actually shined your light and got in the vehicle, is that correct?

A. No, sir.

Q. Well, you entered the vehicle, didn't you?

A. No, sir.

Q. You didn't put your head in or your arms in at all?

A. I walked up to the open door of the vehicle.

Q. All right. Did you lean in?

A. Not until I had saw the pouch.

Q. Well, how could you see the pouch if it was under an armrest?

A. I knew after I lifted the armrest that it was a pouch.

Q. All right. In other words, you had to lift the armrest to even see the pouch?

A. Yes, sir, after I had shined my light on it.

Q. All right. So, when you looked inside the vehicle, you didn't observe anything, but then you started lifting the armrest and looking under things; is that true?

A. No, sir.

Q. Well, did you lift the armrest?

(149) A. Yes, sir.

Q. All right. Did you lift both armrests?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Why didn't you lift both armrests?

A. At that time, I did not, no, sir.

Q. Well, when did you lift both armrests?

A. I lifted the armrest on the passenger side after I had placed him under arrest.

Q. I see. Now, are you saying that the—the pouch was under the armrest which is on the driver's side?

A. Yes, sir.

Q. All right. Now, you've already indicated to the jury that you had testified previously concerning this, and this was at the preliminary examination; isn't that correct?

A. Yes, sir.

Q. And that was on the 22nd day of September, 1977; isn't that true?

A. I am not sure of the date, sir.

Q. Well, you don't quarrel with that date, do you?

A. Pardon?

Q. You don't quarrel with that date, do you?

A. Not at all.

Q. All right. In any event, it was about a month after this (150) incident when you testified at the District Court?

A. If it was in September, yes.

Q. All right. And this, today, now, is August of '78, which is a year after this incident; isn't that correct?

A. Yes, sir.

Q. Now, would you say that your memory as to what occurred on the date in question, which is August the 25th, 1977, that it was fresher when you testified in District Court more so than it is today?

A. Probably about the same, I guess.

Q. About the same? All right. Now, looking at your testimony, on Page 7 of the Preliminary Examination, do you remember this question and this answer?—and this is the prosecutor who's asking you questions.

A. Uh-huh.

Q. "Q. Now, the armrest wasn't open, but you say this leather pouch or whatever was open?

"A. Yes, sir, the armrest was down. When I lifted the armrest,—folded the armrest up, the pouch was open. It was unfolded and it was on the—would be towards the passenger's side of the vehicle."
Do you remember that testimony?

A. Yes, sir.

Q. All right. And is that correct, that testimony that you gave in September of '77?

(151) A. Yes, sir. The—

Q. All right. Thank you.

A. —pouch—

Q. Thank you, Officer.

Now, after you lifted the armrest and you saw the pouch, then you—which is this exhibit—Exhibit Number 2—it's at that point, then, when you say you then retrieved out of that plastic bag and there was a green substance which you believed to be marijuana, and you then arrested my client at that point; is that true?

A. Would you restate the question, please?

Q. All right. I'm not trying to confuse you. I'm just trying to get the facts out. It was after you took this pouch, Exhibit 2, which you say had in it the plastic bag with a substance which you believed to be marijuana—it was at that point, then, that you arrested my client?

A. After I removed the pouch from the vehicle and the bag from the pouch and examined it, yes.

Q. All right. Now, at no time did you arrest him, say, for having this knife in the car, did you?

A. No, sir, I did not.

Q. And isn't it also correct, that you did issue him a traffic citation for speeding?

A. Yes, sir, later on that morning.

Q. Later on that morning? And isn't it also true, that later on, (152) you then asked for that citation back and destroyed the citation for speeding?

A. No, sir, it wasn't destroyed.

• • •

Q. What happened to that citation for speeding?

A. That was taken back from Mr. Long at the request of the prosecutor and voided in reference to awaiting a decision.

Q. So, it was voided out; is that true?

A. Yes.

Q. All right. Incidentally, the license number on this car, do you recall what it was?

A. Tom-Henry-Henry-5 something. I would have to look at the report.

Q. Now, when you say Tom-Henry-Henry, you're referring to the letters T-H-H; is that correct?

A. That's right.

Q. How about T-H-H 581? Does that sound familiar?

(153) A. That may be it, yes, sir.

Q. Pardon?

A. That may be it, yes, sir.

Q. Okay. Do you want to look at anything to be positive or do you accept the fact?

A. Are you asking me?

Q. Do you accept that that is the number?

A. I'll go along with you.

Q. So, the license number was T-H-H?

A. If you want me to be positive, I should probably look at something.

Q. Pardon?

A. If you want me to be positive, I should probably look at something.

Q. Well, is it in the report that you gave the prosecutor Tom-Henry-Henry 581? So, is that the number?

A. To the best of my knowledge, right now, yes, sir.

Q. All right. And this was a '72 Mercury, did you say?

A. Yes, sir.

Q. Marquis Mercury?

A. Well, I believe it was a Brougham, to the best of my—

Q. Oh, I'm sorry.

A. A Brougham, to the best of my recollection. It was a two-door.

Q. It was a two-door? In any event, a '72 Mercury, as you (154) recall. You're not quite sure what it was, other than a '72 Mercury?

A. It was a full-sized car, two-door.

Q. Okay. Fine. Now, incidentally, you did search Mr. Long, and did you ever find any other car keys to this particular car?

A. Are you talking about after he was arrested—placed under arrest and he was searched?

Q. Yes, uh-huh.

A. He was again frisked after he was placed—when we took him back to the cruiser, we frisked him again, I believe. Upon taking him to the Sheriff's Department, I turned him over to the booking officer, then went down with Deputy Lewis. I do not recall positively if there was any other keys or not.

Q. All right. In any event, you did ask him for the keys to the car and he gave you one key, which was the ignition key, right?

A. That is correct.

Q. All right. Did he also tell you he didn't have a trunk key?

A. He didn't say anything. I asked him if there was a trunk key and he stated, No, he didn't have one.

Q. He stated, no, that there was no trunk key?

A. Yes, he stated, "No, I don't have one."

Q. "No, I don't have one"? That's what he said. All right.

MR. JERKINS: Nothing further.

THE COURT: Redirect?

(155) REDIRECT EXAMINATION
By Mr. Fisher:

Q. Officer Howell, when you first shined your flashlight into the car, before you lifted the armrest up, did you see anything on the front seat?

A. Other than what I saw something on the armrest.

Q. You saw something what?

A. Under the armrest.

Q. Under the armrest?

A. Yes. I didn't observe anything else.

Q. What was that that you saw under the armrest before lifting it?

A. I couldn't tell for sure.

Q. What did it turn out to be after you lifted up the armrest?

A. It turned out to be the pouch.

Q. You could see a corner of it or something?

A. Yes, sir.

Could I have the pouch back, again, please?

Okay. Okay. The pouch—the pouch was lying thusly. (Indicating) This would be the front of the car. This would be the back of the front seat. The armrest was down, like this. I could see something under the edge of the armrest. I lifted the armrest up. It was lying thusly, this side on the driver's side, this side toward the passenger side.

(156) Q. Okay. You could see the edge of it, then, the long side of the pouch?

A. Yes, this side here. (Indicating)

Q. Okay. And when you testified at the preliminary exam that the pouch was towards the passenger side of the vehicle, what did you mean by that?

• • •

A. I think, as I previously stated today, it was lying thusly. (Indicating) The marijuana was in the side of the pouch toward the passenger side of the car.

Q. Was the arm—

A. So, when I looked in—

Q. Okay. Was the other armrest, the one that's on the passenger side, is that right next to the armrest that's on the driver's side?

(157) A. That's correct.

Q. Was part of that armrest on top of the pouch?

A. Yes, sir, it was approximately covering half of this side of the pouch.

Q. Thank you.

MR. FISHER: Thank you. I have no further questions.

THE COURT: Recross examination, Mr. Jerkins?

RECROSS EXAMINATION
By Mr. Jerkins:

Q. In any event, Officer, do I understand that before you went into the vehicle and lifted the armrest, that Mr. Long was outside of the car?

A. Yes, sir. He was back probably behind the rear wheel.

Q. So, he was, from this door, approximately what? eight, ten feet away from the driver door?

A. Probably at least—at least three.

Q. All right. At least three. Was Officer Lewis right next to him?

A. I can't be sure—an assumption on my part.

Q. Well, Officer Lewis was there, wasn't he?

A. Right, but I didn't watch Officer Lewis all the time. I was—

Q. All right. You were between my client, Mr. Long, and the vehicle; is that correct?

A. No.

Q. Well, weren't you by the doorway?

(158) A. Yes. Mr. Long was right next to the side of the car.

Q. All right. But towards the rear of the car?

A. Yes, sir, that's correct.

Q. And that is a two-door car, is that correct?

A. Yes, sir.

Q. So the only way he could get in that passenger—or the driver's side would be to go around you?

A. To get into it?

Q. Yes.

A. I suppose he could slide by me. He would have to come in very close proximity to me, yes.

Q. Well, you're in between he and the seat of that particular car?

A. I am right beside the seat.

Q. I understand that.

A. Beside the open door.

Q. Officer, I'm not trying to confuse you. I'm just trying to position you in relation to him.

A. I was standing by the open door.

Q. All right.

A. That's the best I can say.

Q. All right. So, you were by the door, so that he's by the rear of the car and he's at least—from your testimony—three feet back from that door?

A. Yes, sir. He was back there.

(159) Q. And there was another officer present, isn't that true?

A. That is correct.

Q. And you've already searched Mr. Long and found that there was no weapons on him, isn't that true?

A. I frisked him.

Q. Well, frisked him, searched him, is there any difference?

A. Yes, sir.

Q. There is?

A. Yes, sir.

Q. You mean, that when you frisk, you're not looking for weapons? Is that what you're telling this jury?

A. I am looking for weapons.

Q. All right. And you found no weapons, isn't that true?

A. But I didn't search him.

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(160) • • •

DIRECT EXAMINATION
By Mr. Fisher:

(161) Q. State your name, please.

A. Ricky Arnold Lewis.

Q. What's your occupation, Mr. Lewis?

A. I'm a Deputy Sheriff at the Barry County Sheriff's Department.

Q. And how long have you been employed at the Barry County Sheriff's Department?

A. Approximately four years.

Q. Have you worked there during that entire four-year period?

A. Yes, sir, with the exception of the assignment I was on —special assignment.

Q. What special assignment was that?

A. I was assigned to the Regional Crime Unit.

Q. And what is that?

A. It's an organization made up of five different counties where myself, along with other officers, were assigned for undercover narcotic work in a five-county area.

Q. And when were you employed on this special assignment as an undercover narcotics agent?

A. February of '76 through July of '77.

Q. Thank you. Were you on duty as a Deputy Sheriff here in Barry County last August 25th, 1977?

A. Yes, sir, I was.

Q. Who were you working with?

A. I was working with Deputy Howell.

Q. And what was your shift that day?

(162) A. It was eleven at night 'til seven the following morning.

Q. Do you remember where you and Officer Howell were shortly after midnight on August 25th?

A. Yes, sir, I do.

Q. Where were you?

A. We were heading north—or heading south on Norris Road.

Q. In a patrol car?

A. Yes, sir.

Q. Was that patrol car equipped with radar?

A. That's correct.

Q. Was there much traffic on the road that morning?

A. No, sir, there was not.

Q. Did your radar indicate a speeding car at some point during that morning?

A. Yes, sir, it did.

Q. About what time was that, approximately?

A. About five minutes after twelve.

Q. What—how fast did the radar say the car was going?

A. Seventy-one miles an hour.

Q. And was that car headed in the same direction as your patrol car?

A. No, sir. It was headed north. We met the vehicle.

Q. What did you do after you—well, let me ask you this, first. Is the car, when it passed you, were you able to tell what type of car it was?

(163) A. No, sir.

Q. Could you tell how many people were in the car?

A. No, sir.

Q. Did you look around at the car as it went past?

A. Yes, sir, I did.

Q. Anything unusual about it as you turned around?

A. The only thing that I noticed, it was possibly a dark green vehicle. It had one of the red lenses on the taillight was broken out and it showed a white light to the rear.

Q. Who was driving the car—your car, I should say?

A. Deputy Howell was driving the cruiser.

Q. And what did he do after his car went past you?

A. He then turned around and attempted to go after the vehicle.

Q. And how long did he follow the car?

A. Approximately five minutes or so.

Q. Did it ever get out of your sight?

A. Yes, sir, it did.

Q. How many times?

A. I don't know. There was several hills and curves in the road.

Q. Was it ever out of your sight for—Well, let me put it this way. What was the longest period of time, if you can estimate, that it was out of your sight?

A. A matter of fifteen, twenty seconds.

Q. Did you have occasion to stop this car or come in contact (164) with the driver of the car?

A. Yes, sir, we did.

Q. How did that happen?

A. The vehicle turned on—made left-hand turn off Norris Road onto Mullen Road, at which time the vehicle ended up with the front wheels of the vehicle in the ditch. We then went to the—

Q. Now, let's stop right there for a minute. When you—did you pull up behind the car, then, or what?

A. We pulled up—the vehicle was in the ditch. We pulled up to the side of it.

Q. And did you observe anyone in or outside of the car?

A. Yes, sir, we did.

Q. And where—how many people did you see?

A. We saw one person.

Q. And where was that person?

A. He was sitting in the front seat on the driver's side of the vehicle.

Q. And did you have some contact with that person a few moments after you got out of your car?

A. Yes, I did.

Q. Do you see that person in the Courtroom?

A. Yes, sir, I do.

Q. Would you point him out, please.

A. He's the gentleman in the Courtroom in the gray suit, glasses, (165) and ear-length hair.

Q. Seated at the defendant's table?

A. Yes, sir.

Q. Thank you. What did the defendant do as you pulled up next to his car?

A. He then got out of the vehicle and walked up towards the back of his vehicle.

Q. What kind of a car was it?

A. I believe it was a Mercury.

Q. Was he asked to produce his driver's license by Officer Howell?

A. Yes, sir, he was.

Q. And did he produce it?

A. Not the first time.

Q. Did he produce it the second time?

A. Yes, sir. He was asked again. Then he produced his driver's license.

Q. Did Officer Howell also ask him for registration or proof of insurance?

A. Yes, sir he did.

Q. And what did the defendant do when he was asked for this?

A. He then turned around and started walking towards the front of the vehicle. The driver's door was open. He started walking towards the vehicle.

Q. And what happened at that point?

(166) A. At that time, myself and Deputy Howell spotted a folding knife laying next to the front seat, between the front seat and the open door. He was then told to stop, at which time he did, and myself—I retrieved the knife.

Q. This has been admitted as People's Exhibit Number 1. Can you identify that?

A. Yes, sir, I can.

Q. What is it?

A. It's a folding knife which was lying between the front seat and the driver's door of the vehicle.

Q. The one you've just testified about?

A. Yes, that's correct.

Q. Was it opened or closed when you saw it on the seat?

A. It was closed.

Q. Okay. Thank you. What did you do after you observed the knife?

A. I then picked the knife up.

Q. Where was Officer Howell at this time?

A. He was standing behind me by Mr. Long.

Q. Where was Mr. Long with relationship to Officer Howell as you grabbed the gun—excuse me—as you grabbed the knife?

A. He was back towards the rear of the vehicle by the back door or—

Q. Was he behind the defendant or in front of him, with relationship to the front door?

(167) A. I don't recall exactly where Deputy Howell was standing.

Q. After you picked up the knife, what did Officer Howell do then?

A. He then asked Mr. Long to put his hands on the roof of the car, at which time Deputy Howell patted him down to make sure he was not carrying any more weapons.

Q. Did he find more weapons?

A. No, sir.

• • •

Q. What did you do while Officer Howell was frisking the defendant?

A. I picked up the knife and I returned back to where Deputy Howell and Mr. Long were at, towards the rear of the vehicle.

Q. What did Officer Howell do then? Did you observe him?

A. Yes, I did.

Q. What did he do then?

A. After he patted Mr. Long down, he then went to the open door of the vehicle and looked inside.

• • •

(168) • • •

Q. What did he do after he looked in the front seat?

A. He then looked in the front seat. He then come back out of the vehicle and came over to where myself and Mr. Long were standing.

Q. Where was that?

A. Towards the rear of the vehicle.

Q. Did he have anything with him when he returned back?

A. Yes, sir, he did.

Q. What did he have?

A. He had a brown pouch that appeared to be something like a billfold.

Q. I'm handing you what's been marked as People's Exhibit Number 2. Can you identify that?

A. Yes, sir, I can.

Q. What is it?

A. It's the pouch that Deputy Howell removed from the front seat of the vehicle.

Q. Thank you.

• • •

(171) • • •

Q. Mr. Lewis, I believe we broke off where we were discussing the pouch that's been introduced here as People's Exhibit Number 2, and I believe you indicated that you did see it on that morning in question; is that correct?

A. That's correct.

Q. Now, did Officer Howell—what did—did he bring this back to you or what?

A. He—

Q. Did he show it to you?

A. He showed it to me at that time.

Q. Where were you standing when he showed it to you?

A. I was standing with Mr. Long towards the rear of the vehicle.

Q. Could you see if it contained anything?

A. Yes, sir. Deputy Howell showed me that it did.

Q. What did you see?

A. It contained a plastic bag with brownish-green plant-like material, which we suspected to be marijuana.

Q. Have you ever seen marijuana before?

A. Yes, sir, I have.

Q. Approximately how many times?

A. Approximately well over a hundred times.

(172) Q. Have you ever smelled it?

A. Yes, sir.

Q. Did you examine the contents of this baggie?

A. Yes, sir.

Q. What did it look like?

A. It looked to me like it was marijuana.

Q. Did you smell it?

A. Yes, sir.

Q. What did it smell like?

A. It smelled to me like it was marijuana.

Q. I'm showing you what's been marked as People's Proposed Exhibit Number 3. Can you identify it?

A. Yes, sir, I can.

Q. What is it?

A. It's a plastic baggie containing a brownish-green plant-like material.

Q. Where have you seen it before?

A. It's the plastic baggie that was found in the pouch.

Q. Thank you.

• • •

Q. What did—what happened to the pouch after you examined it (173) and Officer Howell examined it?

A. He then closed the pouch up, and I believe he placed it in his back pocket.

• • •

Q. What were the results of the field test?

A. I got a positive reaction on the field test for marijuana.

• • •

(174) • • •

Q. Now, back out at the—out on the road where the car was in the ditch, did Officer Howell or yourself look into the car in any areas other than the passenger compartment?

A. Deputy Howell looked in the front seat and he also looked in the trunk of the vehicle.

Q. Did you look in the trunk in the car?

A. Yes, sir. When he opened the trunk, I looked in it, also.

Q. What did you observe in the trunk of the car, if anything?

A. Two large bags full of brownish-green plant-like material in (175) the trunk of the vehicle.

Q. Did you have any idea what might be in the bag?

A. From the looks of it, it appeared to me to be marijuana.

Q. Were the bags opened or closed when you first saw them?

A. They were opened. They looked like they'd been cut with a knife.

Q. Here on the floor we have two large bags which have been marked as People's Proposed Exhibits 4 and 5. Can you identify those?

A. Yes, sir, I can.

Q. What are they?

A. They're the two large bags of suspected marijuana that were found in the trunk of the vehicle.

Q. Did—did you smell the contents of each bag?

A. I looked at it and I also smelled of it, yes.

Q. What did it smell like?

A. It smelled to me like it was marijuana.

Q. What happened to the car and the bags—well, let me back up for a minute. Was the defendant arrested that evening?

A. Yes, sir, he was.

Q. What happened to the car and the—those two large bags in front of you after the defendant was arrested?

A. The bags were left in the trunk of the vehicle and a wrecker was called to have the vehicle towed to the Sheriff's Department.

(176) Q. And what happened to the car and the bags when you got back—well, let me ask you this. Was there—did a wrecker come to the scene?

A. Yes, sir.

Q. What did the wrecker do with the car?

A. He pulled it out of the ditch. He then hooked it up to tow it to the Sheriff's Department.

Q. And what did you do while the wrecker was towing the car in?

A. I stood there with the vehicle, stayed with the vehicle.

Q. What were you doing while the tow truck was pulling it into the Sheriff's Department?

A. Myself and Deputy Howell were transporting Mr. Long to the Sheriff's Department. We followed the wrecker in our vehicle directly behind it.

Q. You were right behind the car all the way in?

A. That's correct.

Q. What happened to the car and the bags when you got back to the Sheriff's Department?

A. It was taken to the—behind the Sheriff's Department, at which time I got out of the police car. I opened the garage door and directed the wrecker driver to put the vehicle inside the garage at the Sheriff's Department.

Q. What was done with the bags when you got them inside the garage?

A. The bags were left in the trunk of the vehicle for a period (177) of time.

Q. How long?

A. Approximately four or five hours.

Q. Was the trunk locked at this time or closed?

A. Yes, sir, the trunk was closed.

Q. Were any samples taken out of these bags?

A. Yes, sir, there was.

Q. When were those samples taken out?

A. They were taken out upon our return to the Sheriff's Department. The vehicle was put in the basement. The trunk was then opened again, the samples were taken, and the bags were left in the trunk.

• • •

(178) • • •

Q. Did you perform any field tests on the contents of the large bags?

A. Yes, sir, I did.

• • •

Q. What sort of test is this field test that you perform?

A. It's a narcotics test kit that we have at the office. It contains plastic containers with vials of chemicals in the plastic containers. You put some—some suspected controlled substance in a plastic container. You break the vial. If (179) it turns a certain color, it's supposed to be positive for the controlled substance.

Q. Have you been trained somewhere in the use of this drug—drug testing kit?

A. Yes, sir, I have.

Q. Where was that?

A. I was shown how to do it in recruit school; also, when I worked for the Regional Crime Unit, and also when I went to the narcotics school sponsored by the U. S. Department of Justice.

Q. And what color is the substance supposed to turn if it's marijuana?

A. It's supposed to turn from a bluish to a purplish, somewhere in that vicinity.

Q. And what color did the samples that you took out of the bags turn after you broke the vial?

A. It turned to a purple color.

• • •

(181) • • •

Q. How would you describe the defendant's demeanor when you confronted him on the roadway that evening?

A. I would describe it as he was unsteady, disoriented, didn't exactly know what, for sure, was going on.

• • •

CROSS EXAMINATION
By Mr. Jerkins:

Q. Would you say he was scared, nervous?

A. That's possible, yes.

Q. By the way, what is the speed limit on Norris Road?

A. It's 55 miles an hour.

Q. And the car that Mr. Long was driving was going 71, is that correct?

A. That's correct.

Q. That's 16 miles over the speed limit.

A. That's correct.

Q. Now, after he was out of the car, and you say you and Officer Howell saw the knife—

A. That's correct.

Q. —Officer Howell then told Mr. Long to stop, and he (182) cooperated, didn't he?

A. Yes, sir.

Q. In effect, he cooperated all the time he was there with you, didn't he?

A. That's correct.

Q. All right. He then was searched, as you already told us, for weapons. None were found on him. The knife was retrieved, right?

A. He was patted down, yes.

Q. Same thing, patted down meaning looking for weapons or anything; is that correct?

A. That's basically correct, yes, sir.

Q. All right. Now, did you notice the jumper cables and the screwdriver and hammer and other tools that were in the car on the floor?

A. I believe I recall them in there, yes.

Q. You do recall them there?

A. Yes, sir.

Q. All right. In fact, the car was sort of messy, wasn't it? a lot of tools and papers and things—

A. Yes, sir.

Q. —were in the inside of it; isn't that correct?

A. That's correct.

Q. All right. Now, after he had been patted down, as you call it, for weapons, and the knife had been picked up off the (183) floor—in fact, nobody picked up the hammer or the screwdriver, did they?

A. No, sir.

Q. In any event, after the knife was picked up, Mr. Long was still outside the car and was still towards the rear of the car by you, wasn't he?

A. That's correct.

Q. And Officer Howell then proceeded to search the car, isn't that correct?

A. He looked into the vehicle, yes.

Q. All right. He was looking around, lifting things and looking, wasn't he?

A. I can't testify to what he was doing because I couldn't see what he was doing in the vehicle.

Q. In any event, you knew he was inside the car doing something.

A. That's correct.

Q. And you also knew that there was no way that Mr. Long was going to get into the car at that point, isn't that true, because you had him by you under your control?

A. That's correct.

• • •

(188) • • •

THE COURT: Do you have any further argument over the admission of the exhibits?

• • •

(189) MR. JERKINS: • • •

I would also point out that my other argument is, is that based on the testimony we have heard here today, there is no question but what there is an illegal search and seizure of this vehicle, the testimony clearly shows, and it's more conclusive and more favorable to the defendant than the preliminary examination testimony. It clearly shows that Mr. Long was outside of the vehicle, that he was under the control of Deputy Lewis, that he had been searched for weapons. No weapons were found. That the only item that was found, and he was never charged with any violation of law concerning it, was a knife which was among other tools that were in the car that had already been secured. At that point, there was no threat to either officer's well-being as (190) far as issuing a speeding violation ticket to Mr. Long. That's all they had to do at that point was issue that ticket. They had no basis in law or anything else to search that vehicle at that point since he wasn't even within an arm's length of getting into that vehicle, which is clearly, under the Shmiel Doctrine, you can search within an arm's length. He wasn't even there within that arm's length, and Officer Howell was in the doorway of the vehicle, so that would be impossible for Mr. Long to get in there to try to do anything. And, as Officer Lewis testified, he had him under his control. So, clearly, there was no necessity to search the vehicle other than to search it improperly and illegally under the law. And we start with the presumption that any warrantless search has to fall within an exception in order to be permissive. That in this instance, there is nothing that creates that exception. There's nothing shown.

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(191) • • •

MR. FISHER: With regard to the search, I think the—the key point to remember in that regard—to the search of the front seat, anyway, is that this is a Terry-type of search. The reason for that exception to the warrant requirement is (192) that that source of limited intrusion is necessary to protect the officers' safety. The officers testified that when they asked the defendant for his registration and proof of insurance, that he started to go toward the open door of the car. When they followed him to the car, they saw the knife lying on the front seat, and I believe that this limited source of intrusion into the front seat to see if there were any more weapons there were fully justified under the situation we have here. Thank you.

THE COURT: Anything further, Mr. Jerkins?

MR. JERKINS: Just to clarify a misstatement. I'm sure Mr. Fisher didn't intend it, but the knife was found on the floor, not on the seat.

MR. FISHER: That's what I meant to say, your Honor.

• • •

(193) THE COURT: • • •

Now, as to the other argument you had, Mr. Jerkins, about all of the evidence should be excluded because it was an illegal search, this Court is satisfied from the evidence that this Court has heard that Mr. Howell saw a knife and it was a large knife. And the fact is, I think he called it a weapon, or Mr. Jerkins called it a weapon. But, anyway, I heard the word weapon used here today, and that upon seeing that, he stated that he frisked the defendant. He stated that the defendant was some three feet from him, as I remember. Is three feet the length of that gentleman's arm? The Court is not quite sure. But I think that he was within an arm's length, and the Court will so hold that.

Now, there's no question about it that Mr. Lewis said something about that he had the defendant under his control. However, there is nothing to indicate that Mr. Howell—at least from the testimony I've heard, there's nothing to indicate that Mr. Howell knew that the defendant was under the control of Mr. Lewis. The fact is, as I remember the testimony, Mr. Howell said he didn't know where Mr. Lewis was. I'm satisfied from the proofs that have been submitted that Mr. Howell had a right to make a search for weapons, and in doing so, he uncovered something that appeared to be marijuana and this defendant was placed under arrest, and thereupon, there was a search made of the automobile. (194) This Court concludes that it was an inventory search and the proposed Exhibits 4 and 5 were found. So, the Court's concluding that it was not an illegal search and seizure.

Your motion is denied, Mr. Jerkins, and Exhibits 4, 5, 6, and 7 are admitted.

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(196) • • •

MR. JERKINS: Your Honor, at this time, I would move for a directed verdict of acquittal because all we have at this particular juncture is, in the testimony most favorable to the prosecution, we have Mr. Long in the motor vehicle, apparently, as the driver of the motor vehicle. We—and no mention of any connection of Mr. Long to any of the exhibits. There is nothing at all to show that he had knowledge of the marijuana. There is nothing to show at all that had anything to do in the trunk. In fact, there's evidence quite to the contrary, because it's already come out that he did not have a key to the trunk. There's nothing at all to indicate that he had any access or knowledge of that. There's nothing at all that indicates he had any knowledge as to any pouch underneath the armrest, and in fact, there's nothing here at all to even show that this is his vehicle, that this is his car. There's nothing at all that is there, other than his mere presence in a motor vehicle, as the driver. And under the law, as the Court's well aware, mere presence is not sufficient. There has to be something to show his knowledge. There has to be something to show that he had control or dominion over the items which are the subject (197) matter of this lawsuit. That is totally devoid, so there is absolutely nothing. The jury would be left to speculate at this point as to whether or not he had anything to do with the marijuana in this instance. I submit there is even no questions asked of him by the officers about the marijuana. They didn't even try to talk to him about it. They didn't ask him if this was his pouch or anything, which I find utterly—well, surprising to me that they didn't say to him, "Is this your pouch?" or anything. True, he doesn't have to answer, but they didn't even make the inquiry to find out to see if he'd say, "Yes," "No," or whatever. Just nothing. And I submit, your Honor, that the mere presence of Mr. Long in that vehicle does not establish knowledge or control or dominion over these exhibits, and therefore, on that basis,

since the prosecution has to submit evidence that he knowingly possessed, that he had this control over these items, there is nothing there. Therefore, it does require a directed verdict.

THE COURT: Thank you.

Mr. Fisher?

MR. FISHER: Yes, your Honor. I believe that we have established sufficient facts on the record to justify the—a logical inference on the part of the fact-finder that the defendant did have the required knowledge for these reasons: The pouch that was found was visible to Officer (198) Howell, who was standing outside the passenger—or excuse me—the driver's side of the car. He could see the edge of the pouch sticking out from underneath the armrest. That's right next to where Mr. Long was sitting when he was driving the car. When the armrest was lifted up, the pouch was wide open and there was the marijuana sitting right out—sitting there.

On top of that, Officer Lewis testified that Mr. Long's demeanor, upon confronting him, he seemed to be confused or disoriented. I believe that the—taken as a whole, these facts are sufficient to allow the fact-finder to infer that Mr. Long knew that the marijuana was there and knew what it was. Thank you.

THE COURT: Anything further, Mr. Jerkins?

MR. JERKINS: Only that I've heard nothing that indicates that there is any fact, other than speculation for the jury, to show knowledge or control or dominion over the marijuana. It's not there.

• • •

(199) THE COURT: • • •

The Court's had the benefit of the advice of counsel in chambers while we were examining the law in regard to Mr. Jerkins' motion. The Court has had the benefit of *People* v *Ridgeway* presented to it, and there is a statement in *People* v *Ridgeway*: "The presence in or control over a vehicle in which the substance is found is evidence of possession."

With that in mind, the Court will deny your motion, Mr. Jerkins.

Return the jury, please.

• • •

I am now going to present, by Secretary of State records and documents, the ownership of that car to show you that this was not a car on this date that was owned by my client but owned by another person, a William Brake. We have two documents, which we will offer, showing that the title of that vehicle and the license of that vehicle indicate that that vehicle was not owned by my client, and at the conclusion of the admission of those, that will conclude our case, and then we will argue the case and the law will be given to you. Thank you.

At this time, your Honor, I would offer into evidence, under the Great Seal of the State of Michigan, two documents pertaining to the License Number T-H-H 581, as well as (201) a Certificate of Title for a 1972 Mercury two-door vehicle.

• • •

Your Honor, Defendant's Exhibit 8 is from the Secretary of State, and it shows that—it's dated the 24th day of August, 1978—and it shows that the title to this automobile was not —the name of William D. Brake, and attached to this certificate is a copy of the Application for Certificate of Title, which shows that the vehicle was transferred to a William Brake on the 24th day of June of 1977, which is some eight months before this incident, and that the title still remains with William D. Brake.

Defendant's Exhibit Number 9, from the Secretary of State, shows that as of August 24, 1978, that the application for 1977 license T-H-H 581 was issued to a William D. Brake and that it still remains issued to William D. Brake.

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**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT FOR**
**THE COUNTY OF BARRY**

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN<br>-vs-<br>DAVID KERK LONG,<br>Defendant. | File No.<br>78-100-FY |

## JUDGMENT OF SENTENCE

(Filed October 3, 1978)

At a session of said Court held in the Circuit Courtroom, in the City of Hastings, said County, Michigan, on September 15, 1978.

PRESENT: Honorable Hudson E. Deming, Circuit Judge.

OFFENSE CHARGED: Possession of Marijuana

DEFENDANT'S PLEA: Not Guilty

VERDICT OF JURY X OR COURT: Guilty of Possession of Marijuana

DEFENDANT'S ATTORNEY: Joseph Jerkins

SENTENCE OF COURT: Placed on probation for 2 years. Fine of $750.00; Court Costs of $300.00; payable $50.00 per month commencing 1 month from today. Appeal Rights given.

RECOMMENDATIONS:

DATE OF SENTENCE: September 15, 1978

HUDSON E. DEMING /s/
Circuit Judge

The opinions of the Michigan Supreme Court, reported at *People* v *Long*, 413 Mich 461, .... NW2d .... (1982), and of the Michigan Court of Appeals, reported at 94 Mich App 338; 288 NW2d 629 (1979) were printed in the Petition For Writ of Certiorari.